SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 384

CORNELL STEAMBOAT COMPANY, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND NATIONAL WATER CARRIERS ASSOCIATION, INC.

No. 385

BOSTON TOWBOAT COMPANY, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND NATIONAL WATER CARRIERS ASSOCIATION, INC.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

INDEX.

	Original	Print
Record from D.C.U.S., Southern District of New York	2	1
Petition	2	1
Exhibit "A"—Petition of Cornell Steamboat Company, filed before Interstate Commerce Commission, to dismiss application for permit	16	11
Exhibit "B"—Proposed report of Examiner Andrew C. C. Wilkins in Cornell Steamboat Company—Contract Carrier Application	23	16
Exhibit "C"—Opinion, certificate and order of Interstate Commerce Commission in Cornell Steamboat Company-Contract Carrier Application	32	24
Exhibit "D"—Report of the Interstate Commerce Commission on reargument in Cornell Steamboat Company-Contract Carrier Application	56	45

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—9256

	Original	Print
Record from D. C. U. S., Southern District of New York—Continued		
Petition—Continued		
Exhibit "E"—Certificate and order of the Interstate Commerce Commission in Cornell Steamboat Company-Contract Carrier Application	72	58
Answer of the United States	74	59
Answer of Interstate Commerce Commission	76	61
Intervention of Interstate Commerce Commission	83	65
Notice of motion of National Water Carriers Association, Inc., for leave to intervene and order thereon	85	66
Petition of Boston Tow Boat Company to intervene	90	68
Plaintiff's Exhibit "1"—Proceedings before Interstate Commerce Commission in Docket No. W-359	96	71
Application of Cornell Steamboat Company for permit as contract carrier by water	96	71
Petition of Cornell Steamboat Company to dismiss application for permit (Copy) (omitted in printing)	107	83
Statement of evidence	117	83
Appearances	117	83
Testimony of Frederick Coykendall	119	83
Exhibit "1"—Copy of a representative towing contract used by Cornell Steamboat Company	163	110
Proposed report of Examiner Andrew C. Wilkins (copy) (omitted in printing)	168	
Exceptions of Cornell Steamboat Company to proposed report	179	113
Opinion, certificate and order of the Commission (copy) (omitted in printing)	186	
Petition for reargument and rehearing	201	117
Report of the Commission on reargument (copy) (omitted in printing)	214	
Opinion, Frank, J.	225	123
Findings of fact and conclusions of law	236	134
Final decree and judgment	240	136
Stipulation agreeing as to form of final decree and judgment	242	137
Order allowing appeal of Cornell Steamboat Co.	243	137
Petition of Cornell Steamboat Co. for allowance of appeal	245	138
Assignments of error of Cornell Steamboat Co.	247	139
Citation (omitted in printing)	251	141
Petition of Boston Tow Boat Co., or allowance of appeal	253	141
Order allowing appeal of Boston Tow Boat Co.	254	141
Assignments of error of Boston Tow Boat Co.	256	142
Citation (omitted in printing)	258	
Order, consent and stipulation re certification of original documents	260	143
Clerk's certificate (omitted in printing)	263	
Order convening judges and fixing time of hearing	268	145
Stipulation and addition to record	270	146
Statement of points to be relied upon and designation of record	273	147
Order noting probable jurisdiction	280	147

[fols. 1-2]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

CORNELL STEAMBOAT COMPANY, Plaintiff,

against

UNITED STATES OF AMERICA, Defendant

PETITION—Filed April 2, 1943

I

Jurisdiction of this Court is invoked under the provisions of U. S. C. Title 28, Sections 41(27)(28) and 43-48 inclusive.

II

Plaintiff, Cornell Steamboat Company, is a corporation organized and existing under the laws of the State of New York, with its principal office at 22 Ferry Street, Kingston, N. Y., and is a resident of this judicial district. It is engaged in business as an independent tower, furnishing towage services for hire, by its fleet of tugboats.

III

Plaintiff hereby sues to enjoin, set aside, suspend and annul a certificate and order of the Interstate Commerce [fol. 3] Commission dated February 2, 1943, and effective from and after May 11th, 1943, wherein the Commission certified that public convenience and necessity requires the continuance of operation by Cornell Steamboat Company as a common carrier by water by towing vesels in the performance of towage of non-self-propelled freight-carrying vessels upon certain waters therein specified, in interstate or foreign commerce, and ordered that plaintiff be authorized to perform the said towage services, as a carrier, under the said certificate, subject to the orders, rules, and regulations of the Commission. A copy of said certificate and order is annexed hereto, marked Exhibit E.

IV

The evidence before the Commission showed that plaintiff's business is solely that of furnishing towage services,

under contract, as an independent tower; that it does not carry any cargoes or passengers upon its tugs; that it does not own or operate any carrying vessels; and that it does not enter into any contracts for the carriage of merchandise, property, or passengers.

V

The evidence before the Commission showed that plaintiff's towage services are rendered, under contract, by its tugs, to barges, scows, and similar types of vessels which carry cargoes either on deck or below deck; that the tugs merely attach their towing lines to the vessels to be towed and move them between points as directed by the owners or operators of those vessels; that each vessel towed has its own captain or crew on board, and the plaintiff's employees have nothing to do with the care of cargoes on those [fol. 4] vessels; that the vessels towed, and the cargoes on them, remain in the possession and custody of the owners or operators of those vessels at all times (through their own captains and crews), and there is no bailment of said vessels and their cargoes to the plaintiff.

VI

The evidence before the Commission showed that plaintiff does not issue any bill of lading or similar document for any cargoes on the vessels towed, and has no arrangement (or contract) with anybody except the towage contracts with the owners or operators of the said vessels: that it has no direct or indirect interest in, and many times has no knowledge of the character of, the caroges on the vessels towed, or the origin or final destination of those cargoes; that its responsibility, which is that of a tower, begins when the vessel is taken in tow by its tugs and ends when the tow is left at the agreed destination; that it has nothing to do with the contractual arrangements between the carrier (barge-owner) and the cargo owner as to any forwarding (or delivery) of the cargo; and, that it takes no part in, has no direct or indirect interest in, and no knowledge of the arrangements between the owners of the cargoes and the carriers (barge-owners), either with respect to freight rates or with respect to any other terms of their contracts of carriage.

VII

The evidence before the Commission showed that plaintiff's charges for its towage services are agreed on in its private contracts with the owners or operators of the towed vessels, are in no way dependent upon, or related to, the [fol. 5] freight moneys between those vessels and their cargoes, are direct charges against its customers (the barge-owners) under its contracts with them, and are secured by maritime liens against the vessels towed—not against their cargoes: that in the contracts between the plaintiff and its customers (the barge-owners), the agreed towage charges depend upon the size of the vessel towed and her carrying capacity, because "the larger the unit, the smaller the rate", but the volume, character, or weight of the cargo is of no other concern to the plaintiff: that the towage services can be furnished, if required, to a single vessel at one time, but will then cost the customer more than if several vessels are towed along the river together in a fleet: and that the plaintiff is not a party to any contract of carriage by sharing in any freight moneys as compensation for its towage services.

VIII

The evidence before the Commisison showed that plaintiff's towage services are performed on the Hudson River between Waterford, N. Y., and New York, N. Y., and upon the waters of New York Harbor or the waters surrounding New York City: that the services on the Hudson, north of New York City, are temporarily suspended each winter during those varying periods when the river is closed by ice: that over ninety-five per cent. (95%) of its towage services are furnished between points in the State of New York, including services between New York City and points in New York State on the Hudson River: and that the balance is furnished between points in New York and points in New Jersey on the lower end of the Hudson or the adjacent waters of New York Harbor.

[fol. 6] IX

The evidence before the Commission showed that plaintiff does not advertise its towage services generally and no public schedules of its towing charges are published, the charge in each instance being arranged by private contract

according to the character and extent of the services involved; that plaintiff does not hold itself out to perform towage services, except upon its own terms and for customers of its own choosing: and that it frequently refuses to furnish its towage services except on condition that the owner or operator of the vessel towed contract to release the plaintiff and its tugs from all damages even though the damages result from negligence in the performance of the towage.

X

Plaintiff's towage services have been, and are, contracted and performed under the established law that an independent tower, like the plaintiff, is not a common carrier, is not engaged in the business of a carrier at all, and is free to contract for performance of its towage services upon its own terms, including freedom to contract against liability for negligence; and plaintiff does not hold itself out for the performance of any contracts of carriage as a common, or contract, or private carrier.

XI

Congress, in an Act known as "The Transportation Act of 1940", approved September 18th, 1940 (54 Stat. 952), amended the Interstate Commerce Act and empowered the [fol. 7] Interstate Commerce Commission to regulate carriers by water, in interstate commerce. Congress, in Part III of that Act, relating to water carriers, specifically defined and limited the methods of such regulation and the powers delegated to the Commission. The said provisions expressly relate solely to "carriers". The powers and duties of the Commission (Section 304 *sequi*), such as the classification of carriers, inquiries into rates, establishment of new rates, etc., are plainly and unqualifiedly limited to common or contract carriers,—i. e., persons engaged in the business of carriers.

Section 309 of Part III provides that no common carrier by water shall engage in transportation without the Commission's certificate of public convenience and necessity, and that no person shall engage in the business of a contract carrier by water without the Commission's permit authorizing such operation: and paragraphs (a) and (f) of Section 309 expressly provide for the issuance of certificates or permits to persons who were in *bona fide* operation as com-

mon carriers or contract carriers on January 1, 1940. Thus, in every detail, the Commission was empowered solely to regulate persons engaged in the business of carriers, and no other persons were made subject to Part III of the Act relating to water carriers.

Nowhere in Part III did Congress give to the Commission any authority to put into the category of carriers persons who are not carriers. And Congress did not include any provisions in Part III to change the established law that an independent tower, like the plaintiff, is not a carrier.

Moreover, Congress did not direct or authorize the Commission to regulate water carriers on the same basis, or under the same rules, that the Commission had previously applied to rail carriers, but expressly stated, in the pre-
[fol. 8] amble to the said Transportation Act of 1940, the intent that the Act be so administered "as to recognize and preserve the inherent advantages" of each different form of transportation. And in Part III, relating to water carriers, Congress did not adopt the definition of interstate commerce which it applied to rail carriers or motor carriers, but defined it to mean "transportation of persons or property wholly by water from a place in a state to a place in any other state, whether or not such transportation takes place wholly in the United States." [Section 302 (i) (1).]

XII

After the Transportation Act of 1940 became effective, the Commission, through its Bureau of Water Carriers, gave notice of its intention to regulate independent towers, under Part III, as carriers or as persons engaged in the business of carriers. Plaintiff, believing that intention to be contrary to law, and wishing to determine the issue and to avoid being charged by the Commission with violation of the law, filed with the Commission an application for a permit to engage in the business of a contract carrier, without prejudice to, and expressly reserving, plaintiff's contention that it is not engaged in the business of a carrier and is not subject to the Act; and thereupon presented to the Commission a petition to dismiss the application, on the same grounds.

The said application was filed with the Secretary of the Interstate Commerce Commission on May 21st, 1941. A

photostatic copy will be furnished to the Court upon the final hearing hereof.

Immediately upon the filing of the aforesaid application, and on May 21, 1941, plaintiff filed with the Secretary of the [fol. 9] Interstate Commerce Commission its petition for an order dismissing the application. A copy of said petition is annexed hereto as Exhibit A.

XIII

On October 3, 1941, the testimony of plaintiff's president, Frederick Coykendall, Esq., was taken before Examiner Wilkins, describing in detail the nature of the towage business of the plaintiff, and no testimony was offered by the defendant to rebut or contradict the plaintiff's testimony. Thereafter, on or about January 15, 1942, Examiner Wilkins filed his proposed report, which included his detailed findings of the business in which plaintiff is engaged, as summarized in the preceding paragraphs of this petition. A copy of his proposed report is annexed hereto, marked Exhibit B.

XIV

Plaintiff's exceptions to the Examiner's proposed report were heard on March 12, 1942, by Commissioners Porter, Mahaffey, and Miller, sitting as Division 4 of the Commission. Thereafter, on June 15th, 1942, Division 4 filed its opinion, and the Commission's certificate and order based thereon. Copy of the opinion, certificate, and order, is annexed hereto, marked Exhibit C.

In its opinion, Division 4 concluded that an independent tower, such as the plaintiff, is engaged in the business of a carrier and that plaintiff has held itself out to the public as a common carrier. It also concluded that plaintiff's towage services between New York City and other points in the State of New York on the Hudson River are interstate commerce, because of the fact that tows between those points [fol. 10] may pass through waters of the westerly side of the lower Hudson within the geographical boundary limit of the State of New Jersey.

XV

On August 10th, 1942, on plaintiff's application, the Commission entered an order for a re-argument, and the

re-argument was heard by the Commission on October 21st, 1942, with nine Commissioners sitting, to wit: Commissioners Aitchinson, Lee, Porter, Miller, Mahaffie, Patterson, Splawn, Aldredge and Johnson.

On or about March 1st, 1943, the Commission released its opinion on reargument, dated February 2nd, 1943, affirming the findings and conclusions of Division 4 that the plaintiff, as an independent tower, is engaged in the business of a common carrier, and that plaintiff's towage services between New York City and other places in the State of New York on the Hudson River are interstate commerce. A copy of the said opinion is annexed hereto, marked Exhibit D.

Commissioners Splawn and Patterson dissented from the opinion of the Commisison on the ground that the plaintiff, as an independent tower, is not engaged in the business of transportation or carriage under the established law that there is nothing in the Act to indicate that Congress intended to change the established law with respect to the status of independent towers, and that plaintiff is not subject to the Act. Commissioner Splawn also joined with Commissioners Johnson and Lee in dissenting from the opinion of the Commission, on the ground that towage services between points in the State of New York are not interstate commerce. The dissenting opinions are part of Exhibit D, annexed hereto.

[fol. 11] XVI

Based on its findings and conclusions, the Commission entered a Certificate and Order, dated February 2, 1943 which is annexed hereto, marked Exhibit E, and which plaintiff now seeks to enjoin, set aside, suspend and annul.

By its Certificate, the Commission certified that public necessity and convenience require the continuance of operation by Cornell Steamboat Company as a common carrier by water by towing vessels in the performance of towage of non-self-propelled freight-carrying vessels, in the waters hereinabove described.

By its Order, the Commission authorized "said carrier" to perform the services specified in the Certificate, subject to the Commission's authority and to the orders, rules, and regulations of the Commission.

The Commission directed that the Certificate and Order take effect and be in force from and after May 11, 1943.

XVII

The Commission's said Certificate and Order, dated February 2nd, 1943, was null and void, and should be enjoined, set aside, suspended and annulled because it was and is invalid and erroneous, as a matter of law, and was based upon findings and conclusions of the Commission in its report which were in error as a matter of law, and were without support in and contrary to the uncontradicted evidence before the Commission in the respects and for the reasons following:

(a) The Commission was in error in finding and concluding that plaintiff is engaged in the business of a carrier in the performance of towage services for hire under contract.

[fol. 12] (b) On the uncontradicted evidence in the record, the Commission was in error in failing to find and conclude that plaintiff, as an independent tower, is not a carrier, and is not engaged in the business of a carrier, under the established law of the land, and within the common meaning of the words as applied to the business of carriage and transportation, and within the legislative meaning of the words as used by Congress in statutes relating to the business of carriage and transportation.

(c) In the absence of any provisions in Part III of the Transportation Act of 1940 to indicate an intention of Congress to change the established law that independent towers, such as the plaintiff, are not carriers, the Commission was in error in ignoring the said established law and in assuming that Congress intended to bring such towers within the terms of the Act or to confer upon the Commission authority to classify such independent towers as carriers, —which they are not in fact.

(d) The foregoing errors of the Commission are further indicated by its certificate of a necessity for the "continuance" of operation by plaintiff as a common carrier by water. As plaintiff was not previously

engaged in the business of a common carrier under existing law, there was no basis for a certificate that plaintiff should "continue" to engage in that business.

(e) The Commission was in error in finding and concluding that it has authority under the provisions of Part III of the Transportation Act of 1940 to certify and regulate plaintiff as a person engaged in the business of a common carrier while at the same time finding and concluding that plaintiff would not have the rights and liabilities of a common carrier before the Courts under the law.

[fol. 13] (f) The Commission, as an administrative tribunal of the Federal Government without legislative powers, has wrongfully usurped the powers of the Legislature by attempting to alter the established law that independent towers are not carriers.

(g) Without prejudice to its contention that it is not engaged in the business of a carrier at all, the plaintiff further submits that if the facts and the law support any conclusion that plaintiff is engaged in the business of a carrier within the provisions of Part III of the Act, plaintiff's status in any event should be limited to that of a contract carrier.

(h) The Commission was in error in finding and concluding that the plaintiff has held itself out to perform towage services for the public on such terms and in such manner as to give to the plaintiff the status of a person engaged in the business of a common carrier.

(i) Under the established law, as well as under the specific provisions of Part III of the Transportation Act of 1940, the Commission was in error in finding and concluding that plaintiff's towage services between New York City and points in New York State on the Hudson River are interstate commerce.

(j) The Commission was in error under the law, and on the uncontradicted facts, in its refusal to grant plaintiff's petition to dismiss plaintiff's application for a permit as a contract carrier on the ground that plaintiff is not engaged in the business of a carrier and therefore is not subject to Part III of the Transportation Act of 1940.

[fol. 14] XVIII

Unless the relief prayed for herein be granted, plaintiff's rights will be seriously infringed, and plaintiff will sustain irreparable loss and injury.

Wherefore plaintiff prays:

First: That, pursuant to the Urgent Deficiencies Act, 38 Stat. 220, as reenacted as Section 47 of Title 28 U. S. C., a court of three judges, one of whom shall be a Circuit Judge, shall be convened to hear this case.

Second: That, after such hearing is had upon due and legal notice to the defendant, the Court will find and conclude that plaintiff, in its business of an independent tower, is not a carrier and is not engaged in the business of a carrier and is not subject to Part III of the Transportation Act of 1940, and that the Court will thereupon enter its order suspending, setting aside, and annulling the aforesaid certificate and order of the Interstate Commerce Commission dated February 2nd, 1943, and each and every part thereof, and perpetually enjoining the enforcement thereof: and will further direct and enjoin the Commission to reinstate the proceedings before it and to grant plaintiff's petition to dismiss its application, for lack of jurisdiction.

Third: In the alternative, if this Court, upon said final hearing herein, should find and conclude that plaintiff as an independent tower is a carrier within the terms and provisions of Part III of the Transportation Act of 1940, and is subject to the said Act, the Court will be pleased to find that plaintiff is not engaged in the business of a common carrier and can be subjected to the provisions of the said [fol. 15] Act only as a contract carrier, and will be further pleased to find and conclude that under the existing law and the express provisions of Part III of the said Act the plaintiff does not engage in interstate commerce with respect to any and all towage services performed between New York City and other places in New York State upon the Hudson River; and that the Court will thereupon enter its order decreeing that the aforesaid certificate and order of the Commission dated February 2nd, 1943 is null and void, and directing and enjoining the Commission to reinstate the proceedings before it and thereupon to issue a

proper report, certificate, and order in accordance with the findings and conclusions and order of this Court.

Fourth: That plaintiff may have such other and further relief as may be proper in the premises.

Respectfully submitted, Kirlin, Campbell, Hickox, Keating & McGrann, by Robert S. Erskine, a Member of the Firm, Attorneys for Plaintiff, Office and Post Office Address, 120 Broadway, New York City.

[fol. 16] EXHIBIT "A" TO PETITION

BEFORE THE INTERSTATE COMMERCE COMMISSION

In the Matter of The Petition of CORNELL STEAMBOAT COMPANY to Dismiss Its Application for a Permit under Section 309(f) of Part III of the Interstate Commerce Act

PETITION TO DISMISS APPLICATION FOR PERMIT

Comes now your petitioner, Cornell Steamboat Company, a corporation with a principal office at No. 22 Ferry Street, Kingston, N. Y., and upon the an-exed affidavit of Frederick Coykendall, verified the *16th* day of May, 1941, respectfully prays that the application heretofore filed by it for a permit under Section 309(f) of Part III of the Interstate Commerce Act be dismissed for the following reasons:

1. Your petitioner is not a common carrier, nor a contract carrier nor a private carrier, and is not a carrier of passengers or property in any manner, but its business consists solely of furnishing towage services for hire under private contracts and agreements and by reason of the said facts your petitioner is not subject to and does not come under the regulations of the aforesaid Act.

2. Your petitioner, in the performance of its business of furnishing towage services as stated above, does not engage in nor perform nor furnish any transportation of passengers or property within the lan-
[fol. 17] guage and intent of the provisions of Part III of the Interstate Commerce Act, and by reason of that

fact is not subject to and does not come under the regulations of the said Act.

Without prejudice to its prayer for relief on the grounds hereinabove stated, your petitioner further prays that it be held exempt from and not subject to the regulations of the aforesaid Act in so far as the towage services furnished by it as above stated are furnished wholly intrastate, to and from and between points within the State of New York, irrespective of whether or not the vessels to which the towage services are so rendered or any cargoes or property on board the said vessels are or may be engaged in interstate movements.

And your petitioner further prays that it may have such other and further relief as may be just in the premises.

May 16th, 1941.

Cornell Steamboat Company, by Frederick Coykendall, President, 22 Ferry Street, Kingston, N. Y.;
——— ———, Attorney for Petitioner.

[fol. 18] BEFORE THE INTERSTATE COMMERCE COMMISSION

In the Matter of the Petition of CORNELL STEAMBOAT COMPANY to Dismiss Its Application for a Permit under Section 309(f) of Part III of the Interstate Commerce Act

AFFIDAVIT

STATE OF NEW YORK,
County of New York, ss:

Frederick Coykendall, being duly sworn, says:

1. I am President of Cornell Steamboat Company, the petitioner herein, which is a corporation incorporated under the laws of the State of New York, with a principal office and place of business at 22 Ferry Street, Kingston, N. Y., and with a further office for the transaction of business at the foot of West 53rd Street, Borough of Manhattan, New York City.

2. Your petitioner, on January 1st, 1940, was and still is engaged in the business hereinafter described and the said company and its predecessor companies have been en-

gaged in the said business for upwards of more than ninety years.

3. Your petitioner has filed with the Interstate Commerce Commission an application for a permit under Section 309(f) of Part III of the Interstate Commerce Act; but has filed the application without prejudice to its con- [fol. 19] tention that it is not subject to and does not come under the regulations of the said Act.

4. Your petitioner has been and still is engaged solely in the business of furnishing towage services for hire, but it does not and never has held out that it is ready and willing to furnish said services to all comers, and has at all times reserved and still does reserve its right to undertake and perform only such towage services as it may see fit; and each and every towage service which it undertakes is performed under special agreement, either oral or written, with the owners or operators of the vessels towed.

5. Your petitioner's towage services as aforesaid are rendered and furnished in the waters of the Hudson River between Waterford, N. Y., and New York City, N. Y., and in the waters of the Harbor of New York and the waters surrounding New York City, between and to and from various points within those waters. The towage services in the Hudson River are usually suspended from about December to March of each year on account of ice.

6. For the performance of the said towage services your petitioner owns a fleet of upwards of 33 tugboats of varying size, power, and type, which are particularly fitted for the performance of the said towage services within the waters referred to above. The number of said tugs in active operation varies at different times of the year.

7. Each and every towage service is performed by your applicant under a special and private agreement entered into with the owner or operator of each vessel towed, and your petitioner has not any interest in any cargo or property which may be carried at any time on or in any vessel towed, nor any interest in the freight moneys payable to the owner or operator of the towed vessel by the owner, shipper, or consignee of any cargo or property on board the same.

[fol. 20] 8. Your petitioner's agreed charge for the towage service rendered under its special and private contract as referred to above is payable by the owner or operator of the vessel towed, and is a lien upon the said vessel, but is not a lien upon any cargo or property carried by the vessel towed, and is wholly independent of and has no connection with any contract or agreement between the owner or operator of the vessel towed and the owner, shipper, or consignee of any cargo on the same with respect to freights or other carrying charges to be paid by the cargo to the owner or operator of the towed vessel.

9. In the performance of its towage services as hereinbefore described, your petitioner does not at any time or in connection with any towage service, directly or indirectly, participate in the making of any through rates which may be agreed on between the owner or operator of the vessel towed and the owner, shipper, or consignee of cargo on board the same; and your petitioner does not at any time, in connection with its performance of any of its towage services, directly or indirectly undertake or agree to perform the said services in consideration of or in connection with, or with relation to, any through rate which may be agreed on between the owner or operator of the vessel towed and the owner, shipper, or consignee of the cargo on board the same.

10. In its aforesaid special and private contracts for the performance of towage services, your petitioner does not contract or undertake to carry or transport, by its tugs, any vessel or any cargo or property on board the vessel so towed, but contracts solely to furnish towage services to the vessel towed; and your deponent is informed and believes that under the established law your petitioner, in the performance of its agreed towage services, is not under any liability as a carrier to the vessel towed, or any property or cargo thereon, but is responsible only for negligence in the performance of the said towage services; and your deponent is further informed and believes that your [fol. 21] petitioner, with respect to any negligence in the performance of its aforesaid towage services, has not the defenses, statutory or otherwise, which might be available to a carrier of passengers or property, and that your petitioner's responsibility for the proper performance of tow-

age services to any vessel towed exists only during the actual performance of said towage services and is at an end as soon as the said agreed towage services have been completed.

11. Upwards of approximately 90% of the towage services performed and rendered by your petitioner under its special and private agreements, as aforesaid, during each year, are rendered and performed wholly within the State of New York to and from and between points within the said state in the waters referred to above. In connection with most, if not all, of those towage services, your petitioner has no knowledge nor any means of knowing the intention of the owner, shipper, or consignee of any cargo or property upon the vessels towed, nor the ultimate destination of such cargo or property. If any of the vessels towed by your petitioner wholly within the State of New York, as aforesaid, move at other times to or from points outside of the State of New York with their cargo or property on board, the said movements to or from points outside of the State of New York are not any part of the towage services rendered by your petitioner, and your petitioner has no connection therewith in any form or manner. Your petitioner's agreed charges under its special or private contracts for its towages of the aforesaid vessels within the State of New York are wholly independent of and have no connection with any towage charges of other parties with respect to other movements of the vessels to or from points outside of the State of New York; and your petitioner is informed and believes that under established law its responsibility with respect to any such vessels towed by it as aforesaid within the State of New York ends upon the completion of its said towage services within the State of New York, and that it is under no further or other responsibility with respect to the said vessels or with respect to any cargo [fol. 22] or property thereon in connection with any other movements of the said vessels to or from points outside of the State of New York.

12. In some instances, your petitioner's special and private agreements for the performance of towage services are made with owners of vessels who, according to your deponent's information and belief, own and operate the said vessels for the carriage of the said owners' products

and property, but in each said instance your petitioner's agreements for the performance of towage services to the said vessels are made with those parties solely in their character as owners or operators of the said vessels.

13. Your deponent believes that under the facts summarized above your petitioner herein is not subject to and does not come under any regulations of Part III of the Interstate Commerce Act, and therefore prays that the application for a permit, heretofore filed by your petitioner, may be dismissed.

14. Your deponent further prays that the Interstate Commerce Commission will grant to your petitioner a hearing with respect to, or an opportunity to submit proofs of, any other facts which the Interstate Commerce Commission may deem to be material in connection with the matters referred to herein.

Frederick Coykendall.

Sworn to before me this 16th day of May 1941. William Parks, Notary Public, Rockland County. Certificate filed in New York County, Clerk's No. 325, Register's No. 3P201. (Seal.)

[fol. 23] EXHIBIT "B" TO PETITION

INTERSTATE COMMERCE COMMISSION

No. W-359

CORNELL STEAMBOAT COMPANY CONTRACT CARRIER APPLICATION

Submitted..... Decided.....

Applicant found entitled to continue operations as a contract carrier by water, in the use of its towboats in towing barges, scows and similar vessels, loaded or light, between points in New York and New Jersey located on the waters of New York harbor, on a year around basis, and between those points and points on the Hudson River up to and including Waterford, N. Y., on a seasonal basis, by reason of having been engaged in such operations

prior to and on January 1, 1940, and continuously since. Permit issued and petition to dismiss application denied.

Robert S. Erskine for applicant.
Stanley Carpenter for rail carrier protestants.
Reginald G. Narelle for water carrier interveners.

REPORT PROPOSED BY ANDREW C. WILKINS, EXAMINER

By application filed May 21, 1941, Cornell Steamboat Company, a New York corporation, with its principal office at Kingston, N. Y., seeks a permit under the provisions of section 309(f)(g) of the Interstate Commerce Act authorizing continuance of operation as a contract carrier by water in interstate or foreign commerce, in furnishing under individual contracts or agreements the services of its [fol. 24] fleet of tugboats in towing barges, scows, and similar vessels carrying their cargoes either below or on deck, from and to all points on the Hudson River between Waterford, N. Y., and New York, N. Y., harbor points located in New York or New Jersey on the waters of the lower Hudson and the adjacent waters of New York harbor. The application was filed without prejudice to applicant's contention that in its performance of towage services for hire it is not a carrier and does not carry or transport any passengers or property, and that it is not subject to the Act.

On May 21, 1941, applicant filed a petition to dismiss its application on the grounds that, in the performance of its business of furnishing towage services as above-described, it does not engage in nor perform nor furnish any transportation of passengers or property within the language and intent of the provisions of part III of the Act, and, therefore, is not subject to and does not come under the regulations of the Act. Without prejudice to its request for dismissal on those grounds, applicant further prays that it be held exempt from and not subject to regulations of the Act insofar as its towage services are furnished wholly intrastate to and from and between points within the State of New York, irrespective of whether or not the vessels to which the towage services are so rendered or any cargoes or property on board those vessels are or may be engaged in interstate movements.

At the hearing rail carriers in Official Classification Territory appeared by counsel as protestants but offered

no evidence. The Northeastern Inland Waterways Association appeared as an intervener by its president, and indicated an interest in developing all of the facts for the record, but offered no evidence. These interveners will have a further opportunity to clarify their positions for the benefit of the Commission in any exceptions to the proposed report herein, which they may file.

Applicant was incorporated in 1878 to continue the towing business started in 1837 by the grandfather of its president, who has held that position for the past 29 years. From its [fol. 25] inception the business of the applicant has been and still is completely owned by succeeding generations of the same family. At the time of the hearing applicant owned and operated a fleet of upwards of 33 towboats, varying in power and size, some of which are powered by steam and others by diesel engines. One scow is maintained in connection with its repair equipment but applicant does not own or operate any barges or lighters or similar type of carrying craft. No cargoes of merchandise for hire or passengers are carried on any of the towboats and they are used exclusively in towing for applicant's customers, over 70 per cent of whom are shippers who own or operate the scows or barges used in carrying their own merchandise. Other customers are water carriers.

Towing services are rendered for customers in New York harbor and anywhere on the Hudson River up to Waterford, which is between the Troy lock and the entrance to the Erie Canal. Operations between points bordering on New York harbor are conducted on a year around basis but those on the Hudson are suspended during the season when ice prevents them, which is generally from the early part of December to about the middle of March. Applicant does not render any towing services on the ocean outside of the limits of New York harbor, as determined by the Commission in its order entered March 26, 1941, in Ex Parte No. 140.

The largest part of applicant's business is done on time contracts entered into for a period of years, while some contracts run for a single year and the balance consists of a small amount of miscellaneous contracts arranged from day to day. Arrangements for all of its towing services, whether for more than a year or for an individual job, are based on separate agreements or contracts. Most of the vessels towed are scows which carry their cargoes on

deck and deep boats or barges which carry the cargoes below deck in the hold. The basis for charges for the towing services has no relation to, or any connection with the amount of the freight charges paid by the owners of the cargoes for their transportation when they do not also own [fol. 26] the scows or barges. The only interest applicant has in a cargo is its weight and the size of the scow or barge on which it is loaded. The rate charged for towing is lower for the larger units. For example, the rate per ton for towing a 2000-ton barge would be less than the rate per ton for a 200-ton barge. The rate is also lower if the scow or barge is towed with others in a flotilla which applicant schedules for its customers to leave New York harbor on certain days of the week and to leave Albany, N. Y., or some other point on the upper Hudson certain other days of the week. This regular service is maintained under contract to meet the needs of certain customers. Other customers who can wait for their service until the regular flotilla is towed are given the benefit of the lower unit cost. If a customer desires individual service on a certain day the rate is necessarily higher.

No holding out of any offer of towing services is advertised by applicant in any daily papers or trade journals. Its witness thought that a simple announcement of towing services had been carried in the Bullinger's Guide for many years. An examination of the 1939, 1940 and 1941 editions of that guide fails to disclose such an announcement. Its business has been built up with certain individual customers over the many years of its operation. It has at times refused requests for towing services for various reasons, among which are the condition of the property to be towed, the requirement of a release from all liability, and when the requested service could not be rendered without injury to service desired by one of the regular customers.

Applicant does not issue any bill of lading or similar document with respect to the cargoes on the scows or barges towed. Each scow or barge has its own captain who looks after the safety of the vessel and its cargo. Neither the captain of the towboat nor any other employee of applicant has anything to do with the cargoes on the vessels in the tow. Applicant generally has no interest in or knowledge of the origin or final destination of the cargoes, and when the towing service is complete with the landing of the vessel at the place agreed upon, no further services are rendered. No

[fol. 27] arrangements for any through movement, of which the towing services might be a part, are ever entered into by applicant with any carrier. Therefore, the towing services rendered by applicant between points in the State of New York are, insofar as intrastate cargoes are concerned, intrastate in character and are not subject to regulation by this Commission. See section 302 and section 303(j)(k) of the Act. Approximately 95 per cent of the towing services of applicant are rendered between points in the State of New York. However, these services are sometimes rendered in connection with interstate cargoes, and applicant requests that such services, irrespective of whether the vessels or their cargoes are or may be engaged in interstate movements, be held exempt from regulation. The Commission has no authority to hold such services exempt from regulation. It does have the discretion under the provisions of section 306(e) to grant relief to contract carriers with respect to the filing of minimum rates and charges and observance thereof. But the evidence in the present record does not warrant the exercise of that discretion herein. Moreover, applicant has on file with the Commission its tariff I. C. C. No. 2, containing schedules of its minimum rates and charges for the performance, as a contract tower, of only such towage services as it may see fit to undertake on the Hudson River between Waterford, N. Y., and New York, N. Y., and on the waters of New York Harbor and the waters adjacent thereto, and intermediate points.

A check of applicant's records for the year 1940, which is considered fairly representative of its annual business for the past ten years, shows that only 4.4 per cent of its towing services were rendered between points in New Jersey adjacent to the lower Hudson River or New York Harbor and points outside the harbor in New York State. Regardless of the small proportion of the services rendered in connection with interstate movements it will be necessary for applicant to have a permit if it continues to render such services.

Towing services rendered by applicant in connection with interstate cargoes between points within the limits of the [fol. 28] Harbor of New York, N. Y., when such services are not a part of a continuous through movement under common control, management, or arrangement to or from a place outside the limits, have been exempted from regulation by the order of March 26, 1941, entered by the Commission in

Ex Parte No. 140, pursuant to the provisions of section 303(g) of the Act.

Upon brief applicant reaffirms the position taken in its petition to dismiss its application herein. It contends as follows:

1. That there are none of the distinctive features of carriage in applicant's business, in that he does not carry anything, does not have possession of either cargoes or passengers, has no direct or indirect connection with any contract of carriage, has none of the responsibilities of a carrier, and that he is not a carrier and is not engaged in the business of a carrier.

2. That by the plain language of the Act, the only persons or parties who are required to apply for certificates or permits and to whom the Commission has authority to issue them, are carriers; and as applicant is not a carrier it necessarily follows that the Commission has no authority to issue to or require applicant to hold a permit as a contract carrier.

3. That the Commission may regulate tugs and towage services which are owned and used as a part of the business of carriers subject to its regulation, but that nothing in the statutory definitions of "transportation facility" and "transportation" in section 302(g) and (h) gives to the Commission the authority to regulate tugs or towage services of an independent tower, who is not engaged in the business of "carrying" and who is not a "carrier."

4. That the administrative ruling of the Bureau of Water Carriers to the effect that a towing company such as applicant must be regarded as being a "car-
[fol. 29] rier" subject to the Act if it performs towage for a shipper or anyone not a carrier subject to the Act, is apparently based on a backhanded, or negative interpretation of the language of section 303(f)(2), and has no logical foundation and is contrary to the plain intent of Congress that section 303(f)(2) should eliminate and exempt incidental services *even when* performed for a carrier subject to part III.

5. That in instances in which the use of tugs or towage services are furnished *in fact* by the carrier itself,

they are an integral part of the carrier's business, and subject to regulation just as other phases of his business; but such instances lend no support to a conclusion that a tower like applicant, who merely performs towage services as herein described, is engaged in the business of a contract carrier by water.

6. That under the common meaning of the words it has long been an accepted fact that a "tower" is not a "carrier", and it must be assumed that when Congress, throughout all of the provisions of part III of the Act, limited those provisions to carriers by water, either common or contract, it intended to give the words their ordinary meaning, and did not intend to authorize the Commission to regulate anyone other than such a carrier.

The above is a brief outline of the main points argued in considerable detail by complainant in its brief, which includes excerpts from certain court decisions cited in support of the above contentions, all of which have been given careful consideration in arriving at the conclusions and findings hereinafter recommended.

Upon the record herein the Commission should reach the following conclusions: that the definitions of "transportation facility" and "transportation" as set forth in section 302(g) and (h) when applied to the towing services [fol. 30] of applicant in the use of its towboats, which are instrumentalities or equipment, in connection with transportation by water, subject to part III, brings applicant within the definition of a "contract carrier by water" set forth in section 302(e), and subject to regulation under the Act; that the provisions of section 303(f)(2) do not have the effect of exempting transportation by water furnished by any person to a shipper or a carrier not subject to parts I, II or III of the Act, nor do those provisions entirely exempt such transportation from regulation when furnished to carriers subject to parts I, II or III, but rather they make such transportation subject to regulation in the same manner as the transportation by such carriers to which such services (performance of floatage, car ferry, lighterage, or towage) are incidental; that it does not appear that the towing services, rendered by applicant to water carriers from and to points outside the limits of New York Harbor

are incidental to any transportation services rendered by such carriers but rather the entire or principal transportation services are rendered by applicant in towing the scows or barges for those carriers, since there is no evidence that those carriers have undertaken to perform under published rates, have performed, or expect to perform any transportation of the scows or barges in addition to the transportation services performed by applicant whereby the towage services of the applicant could be considered "incidental" to any transportation performed by such carriers; and that it must be concluded that the towage services performed by applicant for carriers from or to points outside the limits of New York Harbor, which are not shown to be incidental to any transportation performed by such carriers, and not otherwise exempt under the Act, are not exempt under the provisions of section 303(f)(2); that applicant having been in bona fide operation as a contract carrier by water in the performance of both regular and seasonal towage services prior to, on and since January 1, 1940, over the route or routes and between the ports above described, and having filed its application for a permit within the time limit and in conformance with the other [fol. 31] provisions of section 309(f)(g), is entitled to such a permit; and that the petition to dismiss its application for a permit should be denied.

The Commission should find that applicant was in bona fide operation on January 1, 1940, as a contract carrier by water, in interstate or foreign commerce, in the use of its towboats in towing barges, scows and similar vessels loaded with cargoes or light, between points in New York and New Jersey located on the waters described as included in New York Harbor in the order entered March 26, 1941, in Ex Parte No. 140, on a year around basis, and prior to January 1, 1940, between those points and points on the Hudson River up to and including Waterford, N. Y., on a seasonal basis, ice on the river permitting, from about the middle of March to the early part of December; that such year around and seasonal operations have been continued since that date; and that applicant is entitled to a permit as a contract carrier by water, authorizing the continuance of such year around and seasonal operations, subject, however, to general conditions which are necessary to carry out, with respect to the continuation of applicant's operations, the re-

quirements of part III of the Act, and the orders, rules, and regulations of the Commission thereunder.

An appropriate permit should be issued and an appropriate order denying the petition to dismiss the application should be entered.

[fol. 32] EXHIBIT "C" TO PETITION

INTERSTATE COMMERCE COMMISSION

No. W-359

CORNELL STEAMBOAT COMPANY—CONTRACT CARRIER APPLICATION

Submitted March 12, 1942. Decided June 15, 1942

1. Applicant found entitled to continue operation as a common carrier by water of non-self propelled freight-carrying vessels by means of towing vessels within the limits of New York Harbor, N. Y. and N. J., and on the Hudson River between New York Harbor and Waterford, N. Y., and all intermediate points, by reason of having been engaged in such operation on January 1, 1940, and continuously since. Certificate of public convenience and necessity issued.

2. Applicant's petition to dismiss its application denied.

Robert S. Erskine, for applicant.

Stanley Carpenter, Reginald G. Narello, James A. Martin, Maurice A. Krisel, Richard H. Specker, Harry C. Ames, Alfred S. Knowlton and *Seymour P. Egerton* for intervenors.

Report of the Commission

Division 4, Commissioners Porter, Mahaffie and Miller

By DIVISION 4:

Exceptions to the report proposed by the examiner were filed by applicant and certain of the intervenors, and the issues were orally argued. Our conclusions differ from those recommended by the examiner.

[fol. 33] By application filed May 21, 1941, Cornell Steamboat Company, a New York corporation, with its principal office at Kingston, N. Y., seeks a permit under the provisions of section 309 (f) of the Interstate Commerce Act authorizing continuance of operation as a contract carrier by water in interstate or foreign commerce, in furnishing under individual contracts or agreements the services of its fleet of tugboats in towing barges, scows, and similar vessels carrying cargoes either below or on deck, from and to all points on the Hudson River between Waterford, N. Y., and New York, N. Y., harbor points located in New York or New Jersey on the waters of the lower Hudson, and the adjacent waters of New York Harbor. The petition further prays that if the facts show that applicant, although applying for a permit, is entitled to a certificate, the application be considered one for the appropriate form of authority. The application was filed without prejudice to applicant's contention that in its performance of towage services for hire it is not a carrier and does not carry or transport any passengers or property, and that it is not subject to the act.

On May 21, 1941, applicant filed a petition to dismiss its application on the grounds that, in the performance of its business of furnishing towage services as above described, it does not engage in or perform or furnish any transportation of passengers or property within the language and intent of the provisions of part III of the act, and, therefore, is not subject to and does not come under the regulations of the act. Without prejudice to its request for dismissal on those grounds, applicant further prays that it be held exempt from and not subject to regulation insofar as its towage services are furnished wholly intrastate to and from and between points within the State of New York, irrespective of whether or not the vessels to which the towage services are so rendered are engaged in, or any cargoes or property on board those vessels are moving in, interstate commerce.

Rail carriers in official territory and the Northeastern Inland Waterways Association, Incorporated, intervened at the hearing, but introduced no evidence. The Atlantic [fol. 34] Coastwise and Inland Water Carriers Association, Incorporated, and Mississippi Valley Barge Line Company were permitted to intervene for the purpose of filing exceptions, and the Boston Towboat Company for the purpose of

participating in oral argument. Most of the interveners contend that applicant should be regulated as a common carrier, although differing as to whether services rendered other water carriers should be exempt from regulation.

Applicant was incorporated in 1878 to continue the towing business started in 1837 by the grandfather of its president, who has held that position for the past 29 years. From its inception the business of the applicant has been and still is completely owned by succeeding generations of the same family. At the time of the hearing applicant owned and operated a fleet of upwards of 33 tugboats of undisclosed power and size, some of which are powered by steam and others by diesel engines. One scow is maintained in connection with its regular equipment, but applicant does not own or operate any barges or other type of carrying craft. No cargoes of merchandise or passengers are carried on any of the tugboats. The tugboats are used exclusively in towing for applicant's customers, over 70 percent of whom are shippers who own or operate the scows or barges used in carrying their own merchandise. Other customers are water carriers.

Applicant renders towing services the year around within the limits of New York Harbor, and harbors contiguous thereto, as those limits were defined by us in our order of March 26, 1941, entered in Ex Parte No. 140. It also renders towing services on the Hudson River up as far as Waterford, N. Y., above Troy, N. Y., and the entrance to the Erie Canal, but those operations are suspended during the season when ice prevents them, which is generally from the early part of December to about the middle of March.

Applicant has on file with the Commission its schedule I. C. C. No. 2, containing its minimum rates and charges for the performance, as a contract tower, or only such towage services as it may see fit to undertake under private contract on the Hudson River between Troy, N. Y., and New York Harbor, and intermediate points.

[fol. 35] Applicant's records for the year 1940, which it considers fairly representative of its annual business for the past 10 years, shows that only 4.4 percent of its towing services were rendered between points in New Jersey adjacent to the lower Hudson River and points outside the harbor in New York State. However, much of the transportation between up-river points and harbor points in New York must be interstate commerce, as the New York-New Jersey

boundary follows the middle of the river, 4 Stat. L. 708, and would be crossed in the ordinary course of navigating large flotillas of barges up or down the river.

By far the largest part of applicant's business is done on time contracts entered into for a period of years, while some contracts run for a single year, and the balance consists of miscellaneous contracts arranged from day to day. From 12 to 13 percent of its business is of the latter type. Arrangements for all of its towing services, whether for a period of time or for an individual operation, are based on separate agreements or contracts. The vessels towed are scows which carry their cargoes on deck and barges which carry the cargoes below deck in the hold. Under the form of contract used, the shipper does not agree to make shipments; but if it does make shipments, it agrees to employ the towage services of applicant, and to pay therefor at the rates stated in the contract, which are based upon the capacities of the barges described therein. If reductions are made by applicant in the rates charged other shippers for like service, the contract rates are to be reduced to the same level; and if applicant's fuel or labor costs are increased due to strikes or other causes beyond applicant's control, the contract charges are to be increased provided the increases are also made effective as to other customers for similar services. Barges are not deemed to be in applicant's custody or under its responsibility while lying at docks or not being actually towed. The term of the contract is stated, and provision is made for its continuance from year to year if not canceled at the end of the year. Such a contract, prior to the requirement of law for the publication of tariffs, served the same purpose as a common [fol. 36] carrier published tariff, which fixes rates and conditions for future acceptance. In addition it reserved to applicant the sole right to tow such traffic covered by the contract as the shipper might decide to move by barge.

The charges for towing services have no relation to, and no connection with the freight charges paid by the owners of the cargoes for their transportation. Applicant's only interest in a cargo is with respect to the size of the scow or barge on which it is loaded, and the weight of the cargo which controls the load-water draft of the barge. Rates charged for towing are lower for the larger units. For example, the rate per ton for towing a barge with a minimum of 1,500 tons is less than the rate per ton for a

300-ton-minimum barge. The rate is also lower if the scow or barge is towed with others in a flotilla. Applicant maintains a schedule for its customers under which a tow leaves New York Harbor daily for points as far north as Poughkeepsie, N. Y., and every other day for Albany, N. Y., and other points on the upper Hudson. This regular service is maintained under contract to meet the needs of certain customers. Other customers who can wait for their service until the regular flotilla is towed are given the benefit of the lower unit cost. In flotilla towing the rates are the same to all customers for equal tonnages. If a customer desires individual service the rate is necessarily higher. From 85 to 90 percent of applicant's business is in those flotillas. The flotilla may consist of from 5 to 50 barges. Applicant has practically no limit on such flotillas, but takes all that is offered and adds such additional tugs as may be required.

No holding out of any offer of towing services is advertised by applicant in any daily papers or trade journals. Its witness thought that a simple announcement of towing services had been carried in Bullinger's Guide for many years. An examination of the 1939, 1940 and 1941 editions of that guide fails to disclose such an announcement. Its business has been built up with individual customers over the many years of its operation, and, as the witness said, "The business has been going on for so long that every-[fol. 37] body knows it." Applicant has at times refused requests for towing services for various reasons, among which are the condition of the property to be towed, unsatisfactory credit, and when the requested service could not be rendered without injuring one of the regular customers. How such injury could result is not explained, and, in view of the evidence that there is practically no limit to the number of barges it can include in a flotilla, the statement is unintelligible. It also frequently declines to perform towage unless it is given a release from all liability, including liability for negligence.

Applicant does not issue bills of lading or similar documents with respect to the cargoes on the scows or barges towed. Each scow or barge has its own captain who looks after the safety of the vessel and its cargo. Neither the captain of the tugboat nor any other employee of applicant has anything to do with cargoes on the vessels in the tow. Applicant generally has no interest in and no

"official knowledge" of the origin or final destination of the cargoes, and when the towing service is complete with the docking of the vessel at the place agreed upon, no further services are rendered. No arrangements for any through movement, of which the towing services might be a part, are ever entered into by applicant with any other carrier. Applicant claims a lien on the barges towed for its towing charges, but no lien on the cargoes. When the barge is a chartered one, applicant relies on the credit of the charterer.

Are Towers To Be Regulated As Carriers?

The first and fundamental issue raised is whether persons engaged, as is the applicant, only in towing for others by non-carrying vessels are to be regulated as carriers under part III of the act.

In its brief applicant contends that its petition should be granted and its application should be dismissed, for the following reasons:

> The petitioner is not a carrier, and is not "engaged in the business of a contract carrier by water."
>
> [fol. 38] No authority is vested in the Commission by part III of the act, and more particularly section 309(f) to issue a permit to, or to require that a permit be held by, any person who is *not* "engaged in the business of a contract carrier by water."
>
> The legislative history of the act and the language of the act itself indicate plainly that Congress did not include towers, such as the petitioner, in the category of the water *carriers* which Congress intended to regulate.
>
> In the absence of any specified provision of the act to bring towers, such as the petitioner, within the category of water *carriers*, it can not be assumed that Congress intended to change the long established law of the land that such a tower is not a carrier, or that Congress intended to include such a tower when it authorized the Commission to regulate *carriers* by water.

In support of its contention that it is not a carrier, applicant relies upon the following court decisions and the statements therein which are first set forth. This is followed by our own comments.

In *Stevens* v. *The White City*, 285 U. S. 195, 200, the court said that under a towage contract the tug is not a bailee of the vessel in tow or its cargo; that it does not have such control of the tow as belongs to common carriers and other bailees; that the vessel in tow, its cargo and crew, remain under the authority of its master, and in emergency the duty is on him to determine what shall be done for the safety of his vessel and her cargo; and that a contract merely for towage does not require or contemplate such a delivery as is ordinarily deemed essential to bailment. This case was an action for damages against a tug for injury to her tow.

In *Wells* v. *The Steam Navigation Co.*, 2 N. Y. 204, 208, the court said that it was a misnomer to call defendants common carriers, or carriers of any kind in relation to the business of towing boats; nor were they bailees, for the [fol. 39] property towed is not delivered to them, nor placed within their exclusive custody or control, but remains in the possession, and for most purposes in the exclusive care of the owners or their servants. This, too, was an action for damages against a steamboat for injury to her tow. The court held that the tower might lawfully contract for a more restricted liability than would be implied against it in the absence of a special contract.

Distinguishing its decision in *Sacramento Nav. Co.* v. *Salz*, 273 U. S. 326, 331, from two earlier cases, the court said therein, "The most important of these differences is that in both cases it was held that contracts of towage and not of affreightment were involved." After referring thereto, applicant goes on to say that section 3 of the Harter Act (46 U. S. C., Sec. 192) gave certain defenses on certain conditions to the owner of "any vessel transporting merchandise or property"; and such defenses were not available to tug owners in performing contracts of towage because their tugs were not transporting or carrying anything. In that case the owner of a barge and a steamer used to tow the barge issued a bill of lading for a cargo loaded on the barge, and through negligence of the towing steamer the barge was sunk and the cargo lost. The sole issue was whether the barge alone or the combination of tug and barge was the "vessel transporting" the cargo, within the meaning of the Harter Act. The Court held that in such case the barge and tug together constitute the vessel transport-

ing merchandise or property within the meaning of that act. The Court there said:

> Considering the language of the bill of lading in the light of all the circumstances, it is manifest that we are dealing with a single contract and the use of the tug must be read into that contract as an indispensable factor in the performance of its obligations. To transport means to convey or carry from one place to another; and a transportation contract for the barge without the tug would have been as futile as a contract for the use of a freight car without a locomotive. In [fol. 40] this view, by the terms of the contract of affreightment, in part expressed and in part necessarily resulting from that which was expressed, the transportation of the goods was called for not by the barge, an inert thing, but by the barge and tug, constituting together the effective instrumentality to that end.
>
> It is said that the Harter Act is to be strictly construed. *The Main* v. *Williams,* 152 U. S. 122, 132. Even so, the rule of strict construction is not violated by permitting the words of a statute to have their full meaning, or the more extended of two meanings. The words are not to be bent one way or the other, but to be taken in the sense which will best manifest the legislative intent. * * *
>
> In *The Columbia, supra,* 73 Fed. 226, it was held that a barge having no motive power and a tug belonging to the same owner and furnishing the motive power constituted one vessel for the purposes of the voyage. In that case, wheat was to be transported by means of the barge, and the owner of the barge and tug undertook the transportation. The court said (p. 237): "As the wheat was to be carried on board the barge, which had no motive power, of necessity such power had to be supplied by the carrier. * * * When the tug made fast and took in tow the barge, to perform the contract of carriage, the two became one vessel for the purpose of that voyage,—as much so as if she had been taken bodily on board the tug, instead of being made fast thereto by means of lines." It was, accordingly, held that without surrendering both vessels, the owner was not entitled to the advantages of Revised Statutes Sec. 4283 *et seq.,* providing for a limitation of liability of "the owner of any vessel," etc.

The Harter Act was again construed in *The Murrell*, 200 Fed. 826, and applicant relies upon the statement of the [fol. 41] court, page 829, that, to say the owner of the tug was "engaged in transporting merchandise or property" where the tug and tow belong to distinct owners having with each other only the relations arising under an ordinary contract for safe towage, would be to extend the words of that act so as to make them include what Congress never intended them to include; that there is nothing in the agreement of the owner of a tug to tow another owner's vessel which can be regarded as making the latter vessel or her cargo the cargo of the tug. That, too, was an action for damage to the tow. While the barge there was under charter to the tow, the court said that to regard tug and barge as one vessel in that case and thus bring it under the Harter Act would be to permit petitioner to treat both vessels as one in a proceeding instituted by him on the theory that they are distinct and independent.

In *Bradley* v. *Lehigh Valley R. Co.*, 145 Fed. 569, 573, the court distinguished that case, where the relation of the tug was one of towage, from *The Nettie Quill*, 124 Fed. 667, where a locomotive carried on a barge towed by that steamer was dumped overboard, in which case a bill of lading had been issued by the steamer, resulting in a contract of affreightment rather than towage.

Applicant further contends that there are none of the distinctive features of carriage in its business; that it does not carry anything, does not contract nor have possession of cargoes or passengers, has no connection with any contract of carriage, has none of the responsibilities of a carrier, is not engaged in the business of a carrier, and that therefore it is not a carrier. It says that it has been a litigant in numerous matters in the Federal courts, but in none of those cases has it or its tugs been held to liability as a carrier.

It will be seen that all the foregoing decisions involved claims for damages to the tow or its cargo, and all held in effect that the owners of towboats, when engaged only in towing vessels belonging to others and not under contracts of affreightment, were not carriers. Relating, as they do, to loss and damage, we do not accept them as determinative [fol. 42] of the status of towers under part III of the act, which specifically provides in section 320(d) that:—

> Nothing in this part shall be construed to affect any law of navigation, the admiralty jurisdiction of the

courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this part.

In view of section 320(d), we consider that a finding that towers are carriers within the contemplation of part III would not affect their liability for loss or damage. Therefore the foregoing decisions may not be construed as a bar to the regulation of towers under part III.

Applicant asserts that part III does not authorize nor contemplate that a permit be issued to or held by anyone but a carrier, and that the history and plain language of part III do not justify the view that Congress intended to authorize the Commission to regulate anyone other than a carrier. In support thereof it relies upon the repeated use of the term "carrier" throughout part III, and cites the use of the same term in the Congressional Record when part III as a bill was under consideration in Congress. It contends that a carrier is one who carries, and that "carry" is defined as "to convey or transport while supporting." As it does not furnish the vessel which supports the freight transported in its tows, applicant concludes that it is not a carrier. But the Circuit Court of Appeals, Seventh Circuit, in *Belt Ry. Co. of Chicago* v. *United States,* 168 Fed. 542 (dismissed on certiorari, 223 U. S. 743), found the Belt Railway Company of Chicago to be a common carrier in the service of transferring the cars of trunk lines from the tracks of one trunk line to the tracks of another within the terminal area, by means of its locomotives, although it did not furnish the cars, and had no dealings with the shippers.

Towage, as such, is specifically mentioned in part III only twice. Section 303, dealing with exemptions, in par. (f) [fol. 43] provides that the provisions of this part shall not apply (1) to transportation by water by a carrier by railroad subject to part I or by a motor carrier subject to part II incidental to transportation subject to such parts, in the performances of floatage, car ferry, lighterage or towage, but such transportation shall be subject to part I or part II; and (2) to transportation by water by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad, or an express company, subject to part I, a motor carrier subject to part II, or a water carrier subject to part III, in the performance of floatage,

car ferry, lighterage, or towage; but that such transportation shall be considered to be performed by such carrier or express company as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water to which such services are incidental.

Clearly, applicant's operations are not those described in section 303(f)(1); and they are not those described in section 303(f)(2) except to the extent that it performs them for another carrier which is subject to parts I, II, or III; and to the extent that its operations were performed for such other carriers (whether as agent or under a contractual arrangement) it acquired no "grandfather" rights. This section of the act discloses no intention to exempt any towage whatever from regulation, but insures the regulation of certain described towage in connection with regulation of the carrier in whose interest it is performed. If any inference whatever as to towage not described therein is to be drawn from this section, that inference is the purpose of the Congress to regulate, not to exempt from regulation.

Part III, section 302, Definitions, provides, par. (c), that, as used therein, the term "water carrier" means a common or a contract carrier by water. "Common carrier by water" as defined in par. (d) means any person which holds itself out to the general public to engage in transportation by water in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, with one exception not pertinent here. "Contract carrier by water" per par. (e), means any person which, [fol. 44] under individual contracts or agreements, engages in the transportation (other than that referred to in par. (d) and the exception therein) by water of passengers or property in interstate or foreign commerce for compensation. An all-inclusive definition of "transportation" is not given in this part, but it is provided (section 302(h)) that the term "transportation" includes the use of any transportation facility (irrespective of ownership or of any contract, express or implied, for such use), and includes any and all services in or in connection with transportation, including the receipt, delivery, (omission) storage, and handling of property transported or the interchange thereof with any other agency of transportation. And "transportation facility" is defined (section 302(g)) to include any

vessel, warehouse, wharf, pier, dock, yard, grounds, or any other instrument or equipment of any kind, used in or in connection with transportation by water subject to this part.

Transportation is defined in Funk and Wagnalls Standard Dictionary as "the act of transporting, or the state of being transported; conveyance; carriage of persons or commodities from one place to another"; and "transport" as "to carry or convey from one place to another. Specifically: * * * (2) *Nautical.* To haul (a vessel) about a harbor by hawsers."

A tug which engages in towing barges for a carrier subject to the act in the conduct by the latter of interstate transportation, becomes a "vessel used in or in connection with transportation by water subject to" part III. Some of applicant's business is of that nature; but what proportion, and how much thereof would be subject to regulation only as the business of the bill-of-lading carrier, is not disclosed on this record, as applicant did not make a full disclosure of its operations because of its contention that it is not a carrier.

That the furnishing of a facility in connection with interstate commerce by railroad is sufficient to constitute one a carrier subject to part I was settled in *Union Stock Yard & Transit Co.* v. *United States,* 308 U. S. 213. In that case a [fol. 45] stockyard company which had divested itself of control of its railroad tracks, but which was engaged in loading and unloading livestock through use of its platforms and chutes, was held to be a "carrier" providing railroad "terminal facilities", and engaged in "transportation of property wholly by railroad" within part I. Clearly, to the extent that any tower furnishes facilities essential to transportation in interstate or foreign commerce which is subject to part III, it is a carrier within the meaning of that part.

Certainly a tower is engaged in transportation, in the ordinary sense of that term. It hauls vessels from place to place by hawsers. Vessels are property: therefore it conveys property from one place to another. In our opinion, "transportation", as used in part III, is to be taken in its ordinary sense, in addition to including the facilities and services specified in section 302(g) and (h). In this view of the term, a tower engages in transportation by water in interstate or foreign commerce of property or a class of

property for compensation, when for compensation it tows barges across a State line. It is therefore a carrier within the definitions of carriers in part III, and subject to the extent that its operations fall within the exemptions provided in that part.

But entirely apart from the views expressed in the next three preceding paragraphs, we think that authority to regulate towers engaged in the interstate towing of barges for compensation is within the broad purposes of part III. There is no contention but that it was intended to subject to regulation the barge in which commodities are moved in interstate commerce. Obviously an inert barge cannot move property in interstate commerce without the aid of a propelling medium. To hold that we can regulate the barge, but cannot regulate the towboat without which the barge cannot move, would be like holding that we can regulate railroad cars but not separately-owned locomotives by which the cars are moved, or can regulate automobile freight-carrying trailers but not separately-owned motors which draw them. It would nullify our authority to see that the charges against shippers are reasonable and non-[fol. 46] discriminatory in at least those numerous instances where the shipper provides his own barge. And it would leave unregulated one class or kind of transportation and a considerable volume of interstate commerce as to which there is, in our judgment, the same need for regulation as in the case of other classes or kinds of transportation and other interstate commerce, which are admittedly subjected to regulation.

Even the furnishing for compensation (under a charter, lease or other agreement) of a vessel, to a person other than a carrier subject to the act, to be used by the person to whom the vessel is furnished in the transportation of its own property, constitutes one a contract carrier by water; section 302(e). Since one who merely furnishes a tugboat to another for the use of the latter in the transportation of his own property is subjected to regulation, *a fortiori* would Congress intend to subject one to regulation who operates a tug for compensation in transporting barges laden with the property of the barge owner. Seventy per-cent of applicant's business is of the latter nature.

We conclude that part III discloses the intention of Congress to regulate towers engaged in interstate towing except to the extent that specific exemptions are provided.

Transportation By Water Between Two Points in the Same State But Passing Through Another State en Route

Having concluded that towers are embraced within the term carriers as used in part III, we now turn to a consideration of whether transportation by water between points in a single State but passing through another State is within our jurisdiction under part III. For, as has been shown, in performing towage between New York Harbor and upper Hudson River points much of applicant's traffic crosses the New York-New Jersey State line. This question was not argued by applicant, because of the position it took that it is not a carrier.

Under part I of the act, jurisdiction is specifically conferred over transportation "from one State * * * to [fol. 47] any other State." Sec. 1, par. (1) (c). It is further provided, Sec. 1, par. (2) (a), that the provisions of this part do not apply to transportation "wholly within one State and not shipped to or from a foreign country from or to any place in the United States."

Part II specifically confers jurisdiction over transportation "between any place in a State and any place in another State or between places in the same State through another State." Sec. 203 (a) (10).

Under part III jurisdiction is specifically conferred over transportation "from a place in a State to a place in any other State, whether or not such transportation takes place wholly in the United States." Sec. 302(i)(1). It is also provided, sec. 303 (k), that "nothing in this part shall authorize the Commission to prescribe or regulate any rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose." A like provision is contained in part II, sec. 216(d).

It will be seen that jurisdiction over transportation between points in a State through another State is conferred in specific terms in part II, but not in parts I and III. The Commission and the courts have construed part I as conferring jurisdiction over such transportation, and this is so well established as to require no citations. Should a like construction be placed upon part III?

Examining one of the cases covering such transportation to see the reasoning followed, we turn to *United States* v. *Delaware, L. & W. R. Co.*, 152 Fed. 269. The shipment under consideration moved from New York, N. Y. to Buffalo, N. Y., through New Jersey and Pennsylvania. The court, although recognizing that the language "from one State to any other State" was susceptible of the literal interpretation that it would not include the transportation there involved, pointed out also that "at the same time it is a perfectly correct statement to say that goods shipped from New York to Buffalo on the Lackawanna road are transported from one State to another"; and expressed [fol. 48] the view that too much weight should not be given "to a critical examination of the precise language" defining transportation subject to part I as transportation "from one State to any other State." Such transportation, said the court, cannot be efficiently regulated at all unless it is regulated by the United States. The court referred to the provision excepting transportation "wholly within one State", and reasoned that the word "wholly" imports that the provisions of the act shall apply to any transportation of property which is not wholly within one State. But it does not follow that the court would have held otherwise than it did in the absence of such a provision, when it is considered that this was a proceeding under the Elkins Act, and if the carrier was not subject to part I with respect to this transportation, it could rebate with impunity, as obviously it was not an intrastate shipment which could be regulated by the State of New York, and in the absence of Federal regulation it was not subject to regulation at all; and there could be no reasonable ground for supposing that Congress intended to produce such a result. The exception in part I as to transportation "wholly within one State" amounts to nothing more or less than a denial of any jurisdiction over intrastate commerce as such. As above indicated, part III likewise contains a provision to the same effect only broader, namely, that this Commission shall not regulate rates for intrastate transportation for any purpose whatever; so that if the words "wholly within a State" in part I fortify the conclusion that the Commission has jurisdiction under that part over transportation between points in a single State through another State, the part III provision referred to fortifies a like conclusion as to similar transportation under part III. The reasons

for holding the transportation considered in the case cited, to be subject to part I, are as cogent reasons for finding transportation of the character here considered to be subject to part III.

Taking one illustration: If we were to find that we cannot regulate transportation by water between two points in the same State which passes through another State enroute, we would be in the position of saying that because the origin [fol. 49] and destination are in the same State we have no jurisdiction over through all-water shipments from Chattanooga, Tenn., on the Tennessee River, to Memphis, Tenn., on the Mississippi River, although the route extends from Tennessee through Alabama, back through Tennessee, and through Kentucky to the Ohio River, thence on the Ohio along the border between Illinois and Kentucky to Cairo, Ill., thence on the Mississippi bordering Kentucky, Missouri, Arkansas and Tennessee; but at the same time asserting jurisdiction over transportation between intermediate points on the same route where origin and destination are in different States; in other words, that we can regulate the rates for the several interstate *parts* of the transportation, but cannot regulate the rates for the *through* interstate transportation which is comprised of such parts. The through transportation would thus be left subject to no regulation whatever. *Missouri Pacific R. Co.* v. *Stroud*, 267 U. S. 404.

As between two interpretations, one of which would leave such water transportation as is here considered free of all regulation, and the other of which would subject such transportation to the jurisdiction of this Commission in harmony with the jurisdiction which it clearly has over similar rail and motor transportation under parts I and II, we entertain no doubt that the latter is the correct interpretation, and we so construe part III.

IS APPLICANT A CONTRACT CARRIER OR A COMMON CARRIER?

We come now to a consideration of the issue whether applicant is to be regulated as a contract carrier or as a common carrier. That question must be determined by the nature of the business applicant was conducting on and since the "grandfather" date. "The character of the service, in its relation to the public, determines whether the calling is a public one." *Union Stock Yard & Transit Co.* v. *United States*, 308 U. S. 213, 220.

The fact that applicant does not assume liability as a common carrier for the freight contained in the barges [fol. 50] towed is not conclusive that applicant is not a common carrier. In *Stimson Lumber Co.* v. *Kuykendall*, 275 U. S. 207, quoting *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, the court said, "A common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he rests." In that case a tower of logs was held to be a common carrier, regardless of the fact that all tows were "at owner's risk." It was engaged in the general towboat business; by a tariff it gave public notice of its willingness to transport logs, and the court found that its towboats were devoted to the public use.

Applicant's contention that all its towage has been performed either upon yearly contracts, or upon special contracts covering the individual job, is not determinative of the issue. The ordinary bill-of-lading issued by common carriers generally on every shipment transported is an individual contract covering the transportation of an individual shipment.

The test of a common carrier is whether it transports for the public generally. The evidence of record on that subject is, in part, as follows:

> Question: Within the range of your operation, with credit considerations being favorable, contents of the barges being what you think they should be, will you tow for any one seeking your services?
>
> Answer: We are like to, yes.
>
> . . . . . .
>
> Answer: We don't hold ourselves out at all. As a rule, we do take orders, as I mentioned. I think that 12 or 13 percent of our business is miscellaneous business. People will call up today and say that they want us to take a barge from here to there. We ask what kind of barge it is and how much it carries, and we give them a price, and we do that job. The rest is all by yearly or regular arrangements with customers, even down to the naming of the barge that they want towed.
>
> . . . . . .

[fol. 51] Answer: We have some on the blacklist, whom we do not tow, because we know that they don't pay.

* * * * * * *

Question: But if there is some boat owner who may not have a yearly contract with you—and provided that the vessel and the cargo and the credit arrangement are satisfactory—you will tow his boat in that fleet?

Answer: Surely—if he gives us an order for it before the tow starts.

Witness further testified that in the tows that leave New York nightly for up-river points "we have practically no limits; we take all that will come"; and explained that by "all that will come" he meant, "individual customers or people who have made arrangements with us. * * * We must have the order for the barge before the barges leave the stake boat." He further testified that arrangements for a particular towing job could be entered into over the telephone, and upon inquiry whether such an arrangement would be entered into with persons with whom he had had no prior dealings, replied: "We would want to know something about them. If it was out of the blue, we would want to know who he was, and what he had to go, before we would give him a price." Sometimes prepayment of charges has been required. As to the breadth of applicant's willingness to transport: Witness testified that "Having been there since 1837, we pretty much know every manufacturer on the river. We go to him and ask him for a contract, and show him what kind of service we can give, and he gives us the contract." And again, respecting the daily towing schedules: "The business has been going on for so long that everybody knows it."

We find that the evidence discloses the fact of a general holding out tempered by prudence, a desire for business rather than a desire to exclude any. We find as a fact that applicant holds itself out to the public to tow for anyone with ability and willingness to pay for the service. Such a holding out, accompanied by performance, in itself constitutes one a common carrier.

[fol. 52] FINDINGS OF FACT AND CONCLUSIONS THEREON

Upon the evidence we find the following facts:

1. That this application was filed May 21, 1941, under section 309 (f) of the Interstate Commerce Act, which was within a period of 120 days after that section became effective, but expressly without prejudice to applicant's contention that it is not a carrier, does not transport any persons or property, and is not subject to part III of the act.

2. That applicant, with its own non-carrying vessels was engaged in towing non-self-propelled freight-carrying vessels in interstate or foreign commerce on January 1, 1940, within the limits of New York Harbor, as these limits are defined by us in Ex Parte No. 140, and, during the 1939 season of navigation, on the Hudson River as far north as Waterford, N. Y., and serving intermediate ports.

3. That it has continued so to operate since that date, down to the date of the hearing herein.

4. That on the aforesaid waterways applicant held itself out to tow between all intermediate points; and that it did tow to and from a sufficiently representative number of points to constitute a fulfillment of its holding out as a carrier by towboat between all points on those waterways.

5. That its towage charges have been based upon the size and load-water draft of the vessels towed, and not upon the character of the freight loaded in said vessels except to the extent that the weight of the lading affects the draft of the vessel.

6. That its holding out was to tow non-self-propelled freight-carrying vessels which it considered in seaworthy condition, both loaded and empty, regardless of the character of freight loaded therein, for all who desired to engage its services and whom it considered financially responsible, and that it did so transport.

[fol. 53] Upon these facts we conclude that applicant was in bona fide operation in interstate commerce as a common carrier by water of non-self-propelled freight-carrying vessels by means of towing vessels between all points within the limits of New York Harbor, N. Y. and N. J., as those limits are defined in our order of March 26, 1941, entered in Ex Parte No. 140, and on the Hudson River between New

York Harbor and Waterford, N. Y., and all intermediate points; that such operation has been continued since that date; and that applicant is entitled under the "grandfather" clause of section 309(a) of the act to a certificate of public convenience and necessity authorizing continuance of such operation, subject, however, to general conditions which are necessary to carry out, with respect to continuation of applicant's operations, the requirements of part III of the act, and the orders, rules and regulations of the Commission thereunder.

The petition to dismiss the application will be denied. A certificate will be issued in accordance with these findings.

Referring to applicant's prayer, made without prejudice to its request for dismissal of its application, that it be held exempt from and not subject to regulation insofar as its towage services are performed wholly intrastate, irrespective of whether the vessels to which the towage services are rendered are engaged in, or any cargoes or property on board those vessels are moving in, interstate commerce: A railroad company engaged in moving the cars of others from one trunk line to another with its own locomotives is a common carrier engaged in interstate commerce and subject to the Safety Appliance Acts, even though its services are performed wholly within a State, and though it furnishes no cars, issues no bills of lading, and has no dealings with the shipper or with anyone on his behalf. *Belt Ry. Co. of Chicago* v. *United States, supra.* Likewise, when applicant tows the barges of other carriers, which barges are moving in interstate commerce, applicant engages in interstate commerce. Whether its participation in such interstate commerce is under the conditions embraced in section 303(f), thus exempting the tower from regulation and subjecting the towage to regulation as a part of, and [fol. 54] in the same manner as, the transportation of the carrier from whom applicant receives or to whom it delivers the barges, we cannot determine upon this record because applicant did not make a full disclosure of the facts with respect to such towage. No order of exemption by us is required by towers whose towage is embraced in section 303 (f). Commissioner Miller concurs in the results.

CERTIFICATE AND ORDER

At a Session of the Interstate Commerce Commision, Division 4, held at its office in Washington, D. C., on the 15th day of June, A. D. 1942.

No. W-359

CORNELL STEAMBOAT COMPANY—CONTRACT CARRIER APPLICATION

The Cornell Steamboat Company having filed an application under the provisions of section 309(f) of the Interstate Commerce Act for a permit to continue operations as a contract carrier by water; a hearing having been held; and full investigation of the matters and things involved having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It Is Hereby Certified, That the public convenience and necessity require the continuance of operation by applicant as a comomn carrier by water by towage of non-self-propelled freight-carrying vessels of others, in interstate or foreign commerce, between all points within the limits of New York Harbor, N. Y. and N. J., as those limits are defined in our order of March 26, 1941, and on the Hudson River between New York Harbor and Waterford, N. Y., and all intermediate points.

[fol. 55] It Is Ordered, That said carrier be, and it is hereby, authorized to perform the service specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission.

It Is Further Ordered, That the holding of this certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above, and upon compliance by said carrier with the requirements of the Interstate Commerce Act, and the orders, rules, and regulations of the Commission thereunder.

It Is Further Ordered, That this certificate and order shall take effect and be in force from and after July 24, 1942.

By the Commission, division 4.

W. P. Bartel, Secretary. (Seal.)

[fol. 56] EXHIBIT "D" TO PETITION

INTERSTATE COMMERCE COMMISSION

No. W-359

CORNELL STEAMBOAT COMPANY—CONTRACT CARRIER APPLICATION

Submitted October 21, 1942. Decided February 2, 1943.

Upon reargument, findings in prior report, 250 I. C. C. 301, that applicant is entitled to continue operation as a common carrier by water by towing vessels in the performance of towage of non-self-propelled freight-carrying vessels, loaded or light, within the limits of New York Harbor, N. Y. and N. J, on the Hudson River between New York Harbor and Waterford, N. Y., and all intermediate points, by reason of having been engaged in such operation on January 1, 1940, and continuously since, and that applicant's petition for dismissal of its application should be denied, modified. Corrected certificate issued.

Appearance as in prior report and *Christopher E. Heckman* for intervener.

REPORT OF THE COMMISSION ON REARGUMENT

BY THE COMMISSION:

In the prior report, 250 I. C. C. 301, division 4 found that applicant was entitled to continue operation as a common carrier by water of non-self-propelled freight-carrying vessels by means of towing vessels within the limits of New York Harbor, N. Y. and N. J., and on the Hudson River between New York Harbor and Waterford, N. Y., and all intermediate points, by reason of having been [fol. 57] engaged in such operation on January 1, 1940, and continuously since, and it issued a certificate of public convenience and necessity. The application was in form a petition for a permit under the provisions of section 309(f) of the Interstate Commerce Act authorizing continuance of operation as a contract carrier by water, but it further prayed that if the facts show that applicant, although applying for a permit, is entitled to a certificate, the application be considered as one of the appropriate form of author-

ity. The application was filed without prejudice to applicant's contention that in its performance of towage services for hire it is not a carrier and does not carry or transport any passengers or property, and that it is not subject to the act. On the same date applicant filed a petition to dismiss its application on the ground that, in the performance of its business of furnishing towage services, it does not engage in or perform or furnish any transportation of passengers or property within the language and intent of the provisions of part III of the act, and therefore is not subject to and does not come under the regulations of the act. Without prejudice to its request for dismissal upon those grounds, applicant further prayed that it be held exempt from and not subject to regulation insofar as its towage services are furnished wholly intrastate, to, from, and between points within the State of New York, irrespective of whether or not the vessels to which the towage services are so rendered are engaged in, or any cargoes or property on board those vessels are moving in, interstate commerce. Division 4 denied this petition. Upon petition of applicant, we reopened the proceeding for reargument, and postponed the effective date of the certificate and order to March 24, 1943. At the reargument applicant filed a supplemental brief. The facts are fully set forth in the prior report, and will be repeated here only to the extent necessary to an understanding of the matters herein discussed.

The same three questions are presented on the reargument as in the prior report: (a) Are towers to be regulated as carriers under part III of the act? (b) Is transportation by water between two ports in a single State but passing [fol. 58] through the waters of another State, within the jurisdiction conferred on this Commission by part III of the act? And (c) is applicant a contract carrier or a common carrier? These will be considered in the order stated.

Briefly stated, applicant's main contention is that towers who furnish towage services without assuming contractual obligations and liabilities as to the cargoes upon the vessels towed have for years been held by the courts not to be common carriers; and that therefore when Congress undertook by part III of the Interstate Commerce Act to regulate common carriers by water it must not be understood to have undertaken to regulate such towers. It is pointed out that under this form of towage the barge owners retain

possession and custody of the merchandise upon the barges, through their barge captains who accompany the barges.

Each of the cases in the line of court decisions relied upon involved a defense under section 3 of the Harter Act (46 U. S. C. 192), which provides:

> If the owner of any vessel transporting merchandise or property to or from any port in the United States of America, shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel.

Division 4 discussed representative cases. It is sufficient here to say that in those instances where the contract was for towage only of the loaded vessel, the court held that nothing in the agreement could be regarded as making the vessel or her cargo the cargo of the tug so as to make available to the tug owner the defense provided by the Harter Act. But where the contract was to transport merchandise by means of the barges and tugs of the tug owner, there was a contract of affreightment, the tug and barge became, [fol. 59] for the purpose of the voyage, one vessel, and the defense provided by the Harter Act was available to the tug owner. After discussing these cases, the division said:

> • • • Relating, as they do, to loss and damage, we do not accept them as determinative of the status of towers under part III of the act, which specifically provides in section 320(d) that:
>
> > Nothing in this part shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this part.
>
> In view of section 320(d), we consider that a finding that towers are carriers within the contemplation of part III would not affect their liability for loss or damage. Therefore the foregoing decisions may not be

construed as a bar to the regulation of towers under part III.

Division 4 also discussed at length applicant's numerous contentions, the facts, and the law respecting the definition of a common carrier by water under part III, what constitutes carriage or transportation under that part, the various paragraphs of the Interstate Commerce Act which might throw light on the intention of Congress with respect to the question here under consideration, and the broad purposes of part III. In fact, every contention raised by applicant on reargument and in its supplemental brief as to whether or not towers are brought within the scope of part III was fully discussed in the prior report. We concur in the conclusions of the division for the reasons set forth by it at length, and it would serve no useful purpose to repeat that reasoning herein. The finding that towers engaged in interstate towing for the general public are subject to part III of the act, except to the extent that specific exemptions are provided, is affirmed.

[fol. 60] Coming next to the question of whether transportation by water between two points in the same State, but passing through another State enroute, is within the jurisdiction conferred on this Commission by part III of the act: Division 4 discussed the various provisions of the act bearing upon this question, and illustrated the incongruous results that would follow the acceptance of applicant's contention that transportation of the character here considered is not made subject to our jurisdiction under part III.

In support of its contention that transportation between two ports in New York, but passing enroute through New Jersey, is not interstate commerce within the jurisdiction conferred on this Commission by part III of the act, applicant relies upon *Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549. That case involved a statute of the State of New York imposing a tax upon transportation corporations for the privilege of carrying on business in a corporate capacity within the State, equal to five-tenths of 1 percent of the gross earnings on transportation originating and terminating in the State of New York. The statute expressly provided that the tax would not apply on earnings derived from interstate business. The State assessed the tax on earnings from transportation between New York

ports but which passed through New Jersey waters, which traffic this applicant there contended was interstate and so not taxable by the State of New York. It was stated by applicant's counsel at the reargument herein that there is substantially no difference in the way the traffic is handled now and the way it was handled then as described in that opinion; and the facts of record, recited in the report of division 4, tend to support that conclusion. The traffic was described in the opinion of the Court in the following language:

> Tows for up-river points on the Hudson River are made up at a stakeboat located at Weehawken, within the territorial limits of the State of New Jersey; that there are two stakeboats anchored in the river just below Weehawken ferry; that vessels and boats reported for the up-river tows are taken out to the stakeboats and there made fast, and the tow is there made up, [fol. 61] the towing vessels are attached, and the course pursued by the steamers in going up the river is in the territory of New York and New Jersey; that tows coming down the river pursue a like course, going into the territory of both States, and when the tow arrives in New York harbor, the entire tow, or the greater part thereof, is, as a usual thing, turned in the river, going into the territory of New Jersey and making the turn. Deponent further says that nearly all earnings of the company are from business done within the territorial limits of New York and New Jersey, to such extent as the State of New Jersey is included in the Hudson River and New York Bay, and that it is absolutely impossible to state just when the vessels are within the territorial limits of either State.

The court held that the tax was not a charge upon the navigation of the river, but was upon the doing of business as a corporation of the State within the State. In the course of its opinion the court said:

> Transportation between the ports of the State is not interstate commerce, excluded from the taxing power of the State, because as to a part of the journey the course is over the territory of another State. *Lehigh Valley Railroad* v. *Pennsylvania*, 145 U. S. 192; *Ewing* v. *City of Leavenworth*, 226 U. S. 464. • • •

> We are of the opinion that commerce thus carried on is not interstate commerce, beyond the taxing power of the State, and that the return on which the tax was assessed did not involve the revenues of commerce among the States.

It will be seen that the court indicated that it was following *Ewing* v. *Leavenworth*, 226 U. S. 464. That case involved the constitutionality of a license tax on express companies for receiving and sending packages between points within the State of Kansas, levied by the city of [fol. 62] Leavenworth, Kans. The route of the express company from Leavenworth passed over into the State of Missouri, and thence back into Kansas. The contention was therefore made that the tax was a regulation of and burden upon interstate commerce. The court said that the case was controlled by *Lehigh Valley Railroad* v. *Pennsylvania*, 145 U. S. 192, and distinguished the taxing power from the power of regulation of transportation. We quote:

> It is contended, however, that the contrary result must be reached, applying the principles laid down in *Hanley* v. *Kansas City Southern Ry. Co.*, 187 U. S. 617. In that case this court declared unconstitutional a law of Arkansas undertaking to fix rates upon railway transportation, the transportation in question in that case being a single carriage partly outside of the State of Arkansas from a point within to another point within the State. In the particular instance the transportation covered 116 miles, of which only 52 miles were within Arkansas and the rest without the State. It was held that the right to regulate such commerce was solely in Congress under the Constitution, and that the transportation was a single and entire thing and as a subject for rate legislation was indivisible. The case of *Lehigh Valley Railroad* v. *Pennsylvania, supra*, was called to the attention of the court, and of that case this court said (p. 621):
>
> "That was the case of a tax and was distinguished expressly from an attempt by a State directly to regulate the transportation while outside its borders. 145 U. S. 204. And although it was intimated that, for the purposes before the court, to some extent commerce by transportation might have its character fixed by the

relation between the two ends of the transit, *the intimation was carefully confined to those purposes.* Moreover, the tax 'was determined in respect of receipts for the proportion of the transportation within the State.' 145 U. S. 201. *Such a proportioned tax had been sustained in the case of commerce admitted* [fol. 63] *to be interstate. Maine* v. *Grand Trunk Railway Co.*, 142 U. S. 217. Whereas it is decided, as we have said, that when a rate is established, it must be established as a whole."

The distinction is applicable here. There is no attempt to fix a rate by the authority of the State, which, while single and complete in itself, covers for a considerable part interstate transportation. The privilege tax levied in this case expressly excludes commerce of an interstate character or business done for the Government, and is levied solely on the business done in the City of Leavenworth in receiving packages from points within the State and in transporting packages to like points. Applying the principles of the *Lehigh Valley Case* to such a situation we are of opinion that, *for the purpose of a privilege tax for business thus done,* the municipality, acting under authority of the State, did not exceed its just power. (Emphasis added.)

We conclude that the right of the State of New York to impose a franchise tax based in part upon revenues from business between two ports of that State but which passes through the State of New Jersey, is clearly distinguished from, and constitutes no bar to, the exercise of jurisdiction by this Commission to regulate such interstate transportation.

At the reargument, and in its supplemental brief filed at that time, applicant, while admitting that the geographical boundary between New Jersey and New York follows the middle of the river (4 Stat. L. 708), urges that the State of New York has jurisdiction over the waters of the Hudson River lying west of Manhattan Island to the low-water mark on the New Jersey shore, under an agreement entered into by the two States in 1833. That agreement was ratified by the legislatures of the two States and approved by Congress. It fixes the boundary at the middle of the river and bay, but grants to the State of New York exclusive jurisdiction [fol. 64] over all the waters of the Bay of New York and of

the Hudson River lying west of Manhattan Island and to the south of the mouth of Spuyten Duyvil Creek to low-water mark on the New Jersey side thereof, subject to certain specified rights of property and of jurisdiction of the State of New Jersey, one of which is the exclusive right of property in and to land under the water lying west of the middle of the bay and river; a second is that the State of New Jersey shall have exclusive jurisdiction over wharves, docks, and improvements on the shore of that State, and over all vessels aground or fastened to any wharf or dock on that shore, except that said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers of the State of New York; and another is the regulating of fisheries west of the middle of said waters. This agreement is referred to, and its provisions are set forth in *The People* v. *Central R. Co. of N. J.*, 42 N. Y. 283. The court there, referring to the second exception, said:

> This exception explains the object and nature of the jurisdiction intended to be given to New York. It was to be a police jurisdiction of and over all vessels, ships, boats or craft of every kind that did or might float upon the surface of said waters, and over all the elements and agents or instruments of commerce, while the same were afloat in or upon the waters of said bay and river for quarantine and health purposes, and to secure the observance of all the rules and regulations for the protection of passengers and property, and all fit governmental control designed to secure the interests of trade and commerce in said port of New York, and preserve thereupon the public peace.

Respecting the asserted jurisdiction of the State of New York to decide what is an obstruction upon those waters, the court said:

> The jurisdiction asserted for this State really belongs to the general government. In the case of the [fol. 65] *State of Pennsylvania* v. *The Wheeling Bridge Company and others* (13 How. U. S. 579) Chief Justice Taney said: "The Ohio being a public navigable stream, congress has undoubtedly the power to regulate commerce upon it."

From the north end of Manhattan Island northward to the point where the northern boundary of New Jersey

reaches the Hudson River is some 7 or 8 miles. Applicant therefore asserts that only for this distance would its traffic be outside the waters that are under the jurisdiction of the State of New York. It is not necessary for us to pass upon the question of whether the movement of applicant's traffic through the waters of the western half of the Hudson River lying west of Manhattan Island constitutes it interstate commerce, although this applicant in *Cornell Steamboat Co.* v. *Sohmer, supra,* contended that it was such, since concededly movement through the waters of the western half of the river north of Manhattan Island is through waters under the jurisdiction of the State of New Jersey. The interstate character of applicant's traffic is determined, not by the number of miles that it moves outside the State of New York, but by the fact that it *does* move outside the State.

The finding and certificate of division 4 embrace transportation within the limits of New York Harbor. It is clear that as to towage performed by applicant wholly within New York Harbor applicant is not a party to any arrangement for the through carriage of such barges or the cargoes therein from or to points without the State. In section 303(g) of the act it is provided that the provisions of part III shall not apply to transportation in interstate commerce by water solely within the limits of a single harbor or between places in contiguous harbors, when such transportation is not part of a continuous through movement under a common control, management, or arrangement to or from a place without the limits of any such harbor or harbors. Applicant therefore requires no certificate for such transportation as it performs entirely within New York Harbor, and the certificate will be corrected accordingly.

[fol. 66] We affirm the conclusion of division 4 that transportation between two points in the State of New York, passing through New Jersey territorial waters en route, is within the jurisdiction conferred on this Commission by part III of the act.

Coming finally to the question of whether applicant is a contract carrier or a common carrier: Division 4 recited at length the facts bearing upon this question, even going to the length of quoting some of the testimony. The evidence, as recited by the division, warrants the ultimate finding of fact that applicant holds itself out to the public

to tow for anyone with ability and willingness to pay for the service, and the conclusion that such a holding out, accompanied by performance, constitutes one a common carrier.

The division set forth six numbered paragraphs of findings of fact, which we find to be fully supported by the evidence. We adopt those findings as our own and they are by reference made a part of this report. Upon those facts we affirm the conclusion of the division that applicant was in bona fide operation on January 1, 1940, in interstate commerce as a common carrier by towing vessels in the performance of towage of non-self-propelled freight-carrying vessels, loaded or light, between points within New York Harbor, N. Y. and N. J., as that harbor is defined in our order of March 26, 1941, entered in Ex Parte No. 140, and Waterford, N. Y., and intermediate points on the Hudson River; that such operation has been continued since that date; and that applicant is entitled under the "grandfather" clause of section 309(a) of the act to a certificate of public convenience and necessity authorizing continuance of such operation, subject, however, to general conditions which are necessary to carry out, with respect to continuation of applicant's operations, the requirements of part III of the act, and the orders, rules, and regulations of the Commission thereunder.

We further affirm the division's denial of applicant's petition to dismiss the application.

A corrected certificate and order will be issued.

[fol. 67] JOHNSON, *Commissioner*, concurring in part:

Generally speaking, the Hudson River forms the boundary between New York and New Jersey. The geographical boundary follows the middle of the river, but under an agreement entered into between the two States New York is granted police jurisdiction to the low-water mark on the New Jersey side. Tows for up-river points on the Hudson River are made up at a stakeboat located at Weehawken, within the territorial limits of the State of New Jersey, but such tows originate in New York and are destined to points in New York; they merely pass through the territorial waters of New Jersey. With respect to the transportation performed by this applicant, the Supreme Court has held that "Transportation between the ports of the

State is not interstate commerce, excluded from the taxing power of the State, because as to a part of the journey the course is over the territory of another State." *Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549. For commercial purposes the entire river may be considered the boundary line between the two States. I am, therefore, of the opinion that the transportation here involved is not interstate for the purposes of regulation under the Water Carrier Act.

I am authorized to state that COMMISSIONER LEE joins in this expression.

SPLAWN, *Commissioner*, dissenting:

Applicant has been engaged in the towage business for many years, operating between points in New York and New Jersey within New York Harbor and between New York and points on the Hudson River. Applicant enters into individual contracts in connection with each towage operation. Its charges depend upon the weight of the tow and also whether other ships are towed at the same time. The charges have no relation to the lading on the towed ship and applicant undertakes no responsibility with respect to loss or damage of the towed ship or cargo. Applicant does not hold itself out to transport any commodities [fol. 68] or property, but is willing to enter into contracts with any person or persons desiring its services within the area of its operations.

Although it has filed this application for authority under part III of the Interstate Commerce Act, applicant denies that we have jurisdiction over its operations. It is conceded that applicant's towboats constitute transportation facilities within the meaning of section 302(h) of part III, but it is denied that applicant is a common carrier by water within the meaning of section 302(d). We have found only carriers by water are subject to regulation under part III even though transportation facilities may be furnished by other persons. See *Status of Wharfingers*, 251 I. C. C. 613.

Prior to the enactment of part III, the common law was to the effect that companies engaged in the business of towage were not carriers or charged with the liabilities or entitled to the benefits of laws pertaining to carriers. The reason was that such companies did not enter into con-

tracts of affreightment, but merely agreed to perform specific towage operations. Where, however, the tower also controlled the towed ship containing the lading and entered into contracts with respect thereto, the two ships, one furnishing the motive power, the other the support for the lading, constituted a vessel within the meaning of the Harter Act, relieving carriers from liability for loss or damage when proper equipment had been furnished. *Sacramento Navigation Co.* v. *Salz*, 273 U. S. 326, 331. The protection of this statute ran to "any vessel transporting merchandise or property" and the tug and barge combined were held to constitute such a vessel. The findings in the report do not bring applicant within this special class of towers controlling the towed ships.

Another exception is illustrated by operators of towboats towing logs in Puget Sound and adjacent waters. In *Stimson Lumber Co.* v. *Kuykendall*, 275 U. S. 207, 211, it was held, "In all essential particulars, that service is like the carriage of freight in vessels." With these exceptions, the [fol. 69] law has not regarded operators of towboats to be carriers.

There is nothing in part III to support the conclusion that Congress intended to change the common law with respect to towboats. The only reference to towage is in section 303(f) which exempts any towage performed for carriers and requires that regulation be through the respective rail, motor, or water carrier, as the case may be. This provision furnishes no basis for the conclusion that Congress intended that towboats, as such, not engaging in the transportation of commodities or entering into contracts of affreightment, should be held to be carriers subject to regulation. The undertaking of applicant herein is to render specific services and not to transport goods or property. In the absence of any clear language in the statute declaring towboats to be carriers, and the doubtful constitutionality of such a declaration or construction, I would find that the common law rule still prevails, and that ordinary towage, such as performed by applicant, is not transportation or carriage, subject to part III.

Likewise it seems to me that applicant is not subject to regulation under part III because it is not engaged in interstate commerce as defined therein. It is conceded that its operations within New York Harbor are exempt under our order of March 26, 1941, in Ex Parte No. 140. The only

color of jurisdiction lies in the fact that the transportation between points in New York at times probably crosses the thread of the stream and is thus within the jurisdiction of the State of New Jersey. Section 302(i)(1) defines interstate transportation for the purposes of part III as being "wholly by water from a place in a State to a place in any other State, whether or not such transportation takes place wholly in the United States." Under this definition transportation between two points in the State of Washington would not be in interstate commerce if the vessel had to pass through Canadian waters. No reason appears for giving any broader construction to this section if the vessel happens to pass through the waters of any other State.

[fol. 70] The conclusion in the report rests almost entirely upon the alleged similarity with the provisions of part I. This analogy is unsound because the exact routes of water carriers are indefinite as compared with railroads, particularly where the waterway constitutes a boundary, and because part I was not the result of a single enactment but rather the consequence of many statutes and much interpretation. In the enactment of parts II and IV, the Congress for the purposes of those parts, has specifically included within the definition of interstate commerce, transportation between points within the same State through another State. The failure to include a similar provision in part III can mean only that Congress intentionally limited jurisdiction to transportation between points in different States. This construction is also consistent with the fact that part III contains numerous exceptions and exemptions which are evidence of the Congressional intent to confer more limited jurisdiction than has been given in the other ports of the act.

For the reasons given above, I think that the application should be dismissed for lack of jurisdiction.

PATTERSON, *Commissioner*, dissenting:

The majority finds that applicant, when towing non-self-propelled freight-carrying vessels for the general public, is a common carrier of said vessels. Many of these vessels are loaded but there is no finding that applicant is a common carrier of the commodities with which they are loaded. The theory of the majority appears to be that there is a relation of common carrier and shipper so far as the vessels are concerned, but not as to the cargo on the vessels. Un-

der the finding applicant will have to publish rates for towing vessels but not rates for the transportation of the numerous commodities on the vessels. A vessel, like a freight car, is a facility used to transport goods. It seems to me anomalous to hold that one is a common carrier of the facility and not to find that it is a common carrier of the goods therein.

[fol. 71] It seems clear that prior to the enactment of part III of the act, an independent tower operating as does applicant was not considered a carrier under the law. Applicant's tugs are merely motive power used for the same purpose as horses or tractors might be used, and nothing more. Whether the motive power is attached to the vessel or operated as a separate unit is immaterial. I believe that Congress did not intend to and did not bring such towers under our jurisdiction. I also believe that if applicant were a common carrier under part III, it would be a common carrier of the goods on the vessels which it tows.

[fol. 72] EXHIBIT "E" TO PETITION

Certificate and Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 2nd day of February, A. D. 1943.

No. W-359

CORNELL STEAMBOAT COMPANY—CONTRACT CARRIER APPLICATION

It appearing, That on June 15, 1942, division 4 made and filed its report and issued its certificate and order in the above-entitled proceeding, and that on August 10, 1942, the Commission, by appropriate order, reopened this proceeding for reargument;

It further appearing, That this proceeding has been reargued, and that the Commission, on the date hereof, has made and filed its report on reargument containing its further findings of fact and conclusions thereon, which said report on reargument and the aforesaid report of June 15, 1942, are hereby referred to and made parts hereof:

It is hereby certified, That the public convenience and necessity require the continuance of operation by Cornell

Steamboat Company as a common carrier by water by towing vessels in the performance of towage of non-self-propelled freight-carrying vessels, loaded or light, in interstate or foreign commerce, between points within New York Harbor, N. Y. and N. J., as that harbor is defined in our order of March 26, 1941, in Ex Parte No. 140, and Waterford, N. Y., and intermediate points on the Hudson River.

It is ordered, That said carrier be, and it is hereby, authorized to perform the service specified above, subject, [fol. 73] however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission.

It is further ordered, That the holding of this certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above, and upon compliance by said carrier with the requirements of the Interstate Commerce Act, and the orders, rules, and regulations of the Commission thereunder.

It is further ordered, That the petition of applicant to dismiss the application be, and it is hereby, denied.

It is further ordered, That the aforesaid certificate and order of June 15, 1942, as subsequently postponed, to March 24, 1943, be, and it is hereby, vacated and set aside.

And it is further ordered, That this certificate and order, dated February 2, 1943, shall take effect and be in force from and after May 11, 1943.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 74] In the District Court of the United States

[Title omitted]

Answer of the United States of America—Filed May 26, 1943

Now comes the United States of America, defendant herein, and in answer to the petition says:

1. Admits the allegations of paragraphs I through III of the petition herein, except that it alleges that the effective date of the Commission's order, which was originally May 11, 1943, as alleged in paragraph III, has now been extended to July 11, 1943.

2. Denies the allegations of paragraphs IV through X of the petition to the extent that they are inconsistent with the findings made by the Commission in its reports herein of June 15, 1942 and February 2, 1943 (Plaintiff's Exhibits C and D), to which the court is referred for a more complete statement of the facts.

3. Admits that, as alleged in paragraph XI of the petition, the Commission was granted regulatory jurisdiction over common and contract carrier by water by the Transportation Act of 1940 (54 Stat. 952). The court is referred to that statute for a more complete statement of its provisions. The remaining allegations of paragraph XI are conclusions of law and require no answer.

4. Admits the allegations of paragraphs XII through XVI of the petition, except that it alleges that the effective date of the order is no longer May 11, 1943, as alleged in paragraph XVI, but instead July 11, 1943.

[fol. 75] 5. Denies each and every allegation of paragraph XVII of the answer.

6. Denies that the Commission's order subjects plaintiff to irreparable injury, as alleged in paragraph XVIII of the petition, but alleges that that is immaterial in view of the fact that this is a statutory rather than a strictly equitable proceeding. Further alleges that the United States does not challenge the standing of plaintiff to maintain this suit.

Wherefore it is respectfully prayed that the petition be dismissed and the validity of the Commission's decision be sustained.

Robert L. Pierce, Special Assistant to the Attorney General, Department of Justice, Washington, D. C., Counsel for the United States.

Tom C. Clark, Assistant Attorney General.

May 25, 1943.

Certificate of Service

I hereby certify that I served a copy of the above answer upon each of the following named counsel by mailing them a copy thereof this 25th day of May, 1943:

Kirlin, Campbell, Hickox, Keating & Grann, 120 Broadway, New York, New York.

E. M. Reidy, Esq., Interstate Commerce Commission, Washington, D. C.

Foley & Martin, 64 Wall Street, New York, New York.

Robert L. Pierce.

[File endorsement omitted.]

[fol. 76] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION—Filed May 24, 1943

The Interstate Commerce Commission, intervening defendant in the above-entitled suit, for answer to the petition heretofore filed in this case, answers and says:

I

Answering the allegations of paragraphs I to III, inclusive, of the petition, the Commission admits the same, except that the Commission alleges that the effective date of its order is now July 11, 1943, and not May 11, 1943, as set forth in paragraph III of the petition. For more full and complete information concerning the contents of the Commission's certificate and order dated February 2, 1943, than is contained in said paragraph III, the Commission respectfully refers the court to a copy of said certificate and order, [fol. 77] annexed to and made a part of the petition as Exhibit E.

II

Answering the allegations of paragraphs IV to XVI, inclusive, of the petition, the Commission admits and alleges that it made and entered the report and order of June 15, 1942, annexed to and made a part of the petition as Exhibit C, in a proceeding then pending before it entitled Docket No. W-359; that said proceeding was instituted by the Commission as the result of an application filed with it on May 21, 1941, by the petitioner herein, seeking a permit under the provisions of Section 309(f) of the Interstate Com-

merce Act, authorizing continuance of operation as a contract carrier by water in interstate or foreign commerce, or other appropriate form of authority, in furnishing under individual contracts or agreements the services of its fleet of tugboats in towing barges, scows, and similar vessels carrying cargoes either below or on deck, from or to all points on the Hudson River between Waterford, N. Y., and New York, N. Y., Harbor points located in New York or New Jersey on the waters of the lower Hudson River, and the adjacent waters of New York Harbor; that subsequently full hearings were had upon said application, and thereupon the Commission made and entered and served upon all parties to said proceeding the report of Division 4, referred to in paragraph XIV of the petition; that following the service of said report of June 15, 1942, the Commission, upon petition for that purpose duly made, reopened the pro-
[fol. 78] ceeding for oral argument before the entire Commission on October 21, 1942; that following said oral argument the entire Commission issued its report and order dated February 2, 1943, attached to the petition and made a part thereof as Exhibit D, to which the Commission refers the court for a full and complete discussion of the reasons for the Commission's decision.

Further answering the allegations of paragraphs IV to XVI, inclusive, of the petition, the Commission admits and alleges that in said proceedings the parties thereto, including the plaintiff herein, were, and each of them was, accorded the full hearing provided by the Interstate Commerce Act; that in said hearing testimony and other evidence bearing upon the matters covered in said reports and orders was submitted to the Commission for consideration; that at said hearing and subsequently, both orally and in briefs filed in said proceeding, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of said parties by their respective counsel, including many of the particular questions raised by plaintiff in this suit, whereupon the Commission determined said matters and entered and served upon all the parties to said proceeding, including the plaintiff herein, its said reports and orders of June 15, 1942 and February 2, 1943; that said reports and orders of June 15, 1942 and February 2, 1943, included the Commission's findings of fact, conclusions and requirements in the premises

and that, upon the evidence aforesaid, and as shown in and by said reports, the Commission made the findings and stated the conclusions upon which its order was based.

[fol. 79] The Commission further alleges that the findings and conclusions in said reports of June 15, 1942 and February 2, 1943, were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceeding as aforesaid.

The Commission further alleges that in making said reports, it considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition called to its attention on behalf of the parties to said proceedings by their respective counsel, including many of the matters covered by the allegations of the petition herein.

The Commission further alleges that said reports and orders of June 15, 1942, and February 2, 1943, were not made or entered either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support them; that in making said orders the Commission did not exceed the authority which had been duly conferred upon it, and the Commission denies each of and all the allegations to the contrary contained in the petition.

III

Further answering the allegations of paragraph X of the petition, the Commission denies the same.

IV

Further answering the allegations of paragraph XI of the petition, the Commission admits that by the Transportation Act of 1940, approved September 18, 1940, it was empowered to regulate carriers by water in interstate commerce. The Commission respectfully refers the court to the provisions of said Act for more full and complete information [fol. 80] concerning the duties placed upon it by said Act, than is contained in said paragraph XI.

V

Further answering the allegations of paragraph XII of the petition, the Commission admits the same.

VI

Further answering the allegations of paragraph XIII of the petition, the Commission admits that on October 3, 1941, petitioner's President, Frederick Coykendall, Esq., testified before Examiner Wilkins, and that on or about January 15, 1942, said examiner filed his proposed report, which is annexed to and made a part of the petition as Exhibit B.

VII

Further answering the allegations of paragraph XIV of the petition, the Commission admits the same, except that it refers the court to its opinion, certificate and order dated June 15, 1942, annexed to and made a part of the petition as Exhibit C, for a more full and complete statement of its findings and conclusions than is contained in said paragraph XIV.

VIII

Further answering the allegations of paragraph XV of the petition, the Commission admits the same, except that it refers the court to its report and decision of February 2, 1943, annexed to and made a part of the petition as Exhibit D, for a more full and complete statement of its findings and conclusions than is contained in said paragraph XV.

[fol. 81]

IX

Further answering the allegations of paragraph XVI of the petition, the Commission admits the same, except that it alleges that the effective date of its order has been extended from May 11, 1943, to July 11, 1943.

X

Further answering the allegations of paragraph XVII of the petition, the Commission denies the same.

XI

Except as herein expressly admitted, the Commission denies each of and all the allegations contained in the petition, in so far as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said reports and orders of June 15, 1942, and

February 2, 1943, referred to and made a part of the petition as Exhibits C and D, respectively, which reports and orders are hereby referred to and made parts hereof.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that said petition be dismissed.

Interstate Commerce Commission, By E. M. Reidy, Assistant Chief Counsel.

Daniel W. Knowlton, Chief Counsel, Of Counsel.

[fol. 82] *Duly sworn to by J. Haden Alldredge. Jurat omitted in printing.*

[fol. 82a] [File endorsement omitted.]

[fol. 83] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

INTERVENTION OF INTERSTATE COMMERCE COMMISSION—Filed May 24, 1943

To the Honorable the Judges of said court:

In accordance with the provisions of section 212 of the Judicial Code, 36 Stat. L. 1150 (U. S. Code, Tit. 28, Sec. 45a), providing, in part, "that the Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement," we hereby enter the appearance of the Interstate Commerce Commission as a party defendant, and of ourselves as its counsel, in the above-entitled suit.

Interstate Commerce Commission, by Daniel W. Knowlton, Chief Counsel. E. M. Reidy, Assistant Chief Counsel.

May 22, 1943.

[fol. 84] [File endorsement omitted.]

[fol. 85] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION OF NATIONAL WATER CARRIERS ASSOC., INC., FOR LEAVE TO INTERVENE AND ORDER THEREON

Sirs:

Please take notice that upon the annexed affidavit of Chester H. Sanders, verified the 3rd day of May, 1943, National Water Carriers Association, Inc., will move this Court at a term thereof to be held for the hearing of motions in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York, on the 11th day of May, 1943, at 10:30 A. M., on that day or as soon thereafter as counsel can be heard, for an order allowing National Water Carriers Association, Inc., to intervene in this proceeding and for such other and further relief in the premises as to the Court may seem just and proper.

Dated: New York, May 3, 1943.

Yours, etc., Foley & Martin, Attorneys for Intervenors, 64 Wall Street, New York City.

To:

Messrs. Kirlin, Campbell, Kickox, Keating & McGrann, Attorneys for Plaintiff, 120 Broadway, New York City.

Attorney General of the United States, Washington, D. C.

Secretary of the Interstate Commerce Commision, Washington, D. C.

United States Attorney, Southern District of New York, Foley Square, New York City.

[fol. 86] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT

CHESTER H. SANDERS, being duly sworn, deposes and says:

He is President of National Water Carriers Association, Inc.

This affidavit is made in support of an application by said National Water Carriers Association, Inc., for leave to intervene in the above entitled proceedings.

National Water Carriers Association, Inc., a New York corporation, is the duly authorized successor to Atlantic Coastwise & Inland Water Carriers Association, Inc., a New York corporation. National Water Carriers Association, Inc., is a non-profit sharing association, whose members consist of persons, firms and corporations engaged in the transportation by water of goods for hire. A large number of the members of said Association are interested in and will be affected by the Court's decision on the questions of law involved in this proceeding. Some of the questions of law raised by the plaintiff's petition will have a nationwide effect inasmuch as the Court is asked to construe the various sections of Part III of the Interstate [fol. 87] Commerce Act. Moreover, a number of the members of National Water Carriers Association, Inc., have business relations with the plaintiff herein and aside from the academic interest in the legal questions involved these members will be actually affected by the decision on the question that the plaintiff may be determined to be within the jurisdiction of the Interstate Commerce Commission.

Atlantic Coastwise & Inland Water Carriers Association, predecessor to National Water Carriers Association, Inc., was permitted to and did intervene in the proceedings before the Interstate Commerce Commission which led to the decision made, the order entered and the certificate issued to plaintiff by the Interstate Commerce Commission. When National Water Carriers Association, Inc., succeeded its predecessor said National Water Carriers Association, Inc., continued to take an active part in the proceedings before the Interstate Commerce Commission involving this plaintiff. The said Association was represented at the hearing and argument before the entire Commission and its counsel made oral argument.

Wherefore, deponent respectfully prays that an order be entered permitting National Water Carriers Association, Inc., to intervene in this proceeding.

Chester H. Sanders.

Sworn to before me this 3rd day of May, 1943. Louis E. Greco, Notary Public, Queens County. (Seal.)

[fol. 88] [Affidavits of service omitted in printing.]

[fol. 89] IN UNITED STATES DISTRICT COURT

ORDER—June 9, 1943

The applicant is permitted to submit a brief and appear as an amicus curiae, and at the end of the hearing to renew its application to intervene.

6/9/43.

J. N. F., U. S. C. J.; A. S. C., D. J.; J. B., U. S. F. J.

[fol. 90] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF BOSTON TOW BOAT COMPANY TO INTERVENE—Filed September 15, 1943

Now comes Boston Tow Boat Company, petitioner herein, and says:

First: Petitioner is a Massachusetts corporation with its principal place of business in Boston, Massachusetts, and is the operator of fifteen (15) tugs engaged in harbor, bay and coastwise towing and in rendering such other services as are customarily rendered by tugs to other vessels and floating equipment.

Second: Petitioner intervened in and was a party of record to the proceedings brought by Cornell Steamboat Company, plaintiff herein, before the Interstate Commerce Commission.

Third: Petitioner is aggrieved by the decision of said Commission in the said proceedings before said Commission involving the status of Cornell Steamboat Company, insofar as said decision holds that towers for hire are carriers and subject to the terms and provisions of Part III of the Interstate Commerce Act.

Fourth: By application filed May 28, 1941, petitioner sought a permit under the provisions of Section 309(f) of the Interstate Commerce Act authorizing the continuance of its operation as a contract carrier by water in the performance of general towage between ports and points on

[fol. 91] the Atlantic Coast and tributary waters from Calais, Maine, to New York Harbor, and in the alternative a certificate, (if petitioner were found to be a common carrier,) all without prejudice to petitioner's contention that towers for hire are not carriers and not subject to the terms and provisions of said Act. After certain intermediate proceedings, Division 4 of said Commission decided on May 22, 1943, that petitioner is a common carrier and is entitled to a certificate authorizing it to continue operation "as a common carrier by towing vessels in the performance of general towage, in interstate or foreign commerce, between ports and points on the Atlantic coast north of and including New York Harbor and contiguous harbors as defined by [said Commission's] order of March 26, 1941, in Ex Parte No. 140, * * * and tributary waters other than the Hudson River above the New York Harbor area and the New York State Canal System."

Fifth: Petitioner has contended throughout the course of its proceedings before said Commission, and still contends, that as a tower for hire it is not subject to the terms and provisions of said Interstate Commerce Act, more particularly Part III thereof. This issue has been squarely raised by Cornell Steamboat Company in these proceedings; and petitioner desires to participate in these proceedings solely for the purpose of asserting herein its said contentions regarding such jurisdictional issue. The facts underlying petitioner's operations as a tower for hire (except the fact that petitioner *is* a tower for hire) are somewhat different from the facts underlying the operations of Cornell Steamboat Company; wherefore petitioner believes that no useful purpose would be served by having its intervention relate to any issues other than such jurisdictional issue.

[fol. 92] Sixth: Petitioner files this petition pursuant to authority contained in U. S. Code, Title 28, Section 45a (Judicial Code, Sections 212 and 213) providing (*inter alia*) " * * * That * * * corporations * * * who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the provisions of the aforesaid sections relating to action of the Interstate Com-

merce Commission, may intervene in said suit or proceedings at any time after the institution thereof; * * *"

WHEREFORE, petitioner prays that it be allowed to intervene in and become a party to the above entitled proceedings; and for such other and further relief as it may be entitled to receive in the premises.

Boston Tow Boat Company, by Bingham, Dana & Gould, Attorneys, 1 Federal Street, Boston, Mass. Charles S. Bolster, Attorney at Law and Registered Practitioner before the Interstate Commerce Commission.

SUPPORTING AFFIDAVIT

I, Charles S. Bolster, on oath depose and say:

I reside at Cambridge, Massachusetts, and am a partner in the firm of Bingham, Dana & Gould, with offices at 1 Federal Street, Boston, Massachusetts, attorneys for Boston Tow Boat Company, petitioner to intervene in the above entitled proceedings; I am personally acquainted with the nature and progress of the proceedings before [fol. 93] said Interstate Commerce Commission relative to the status of said Boston Tow Boat Company under the Interstate Commerce Act; I have read the foregoing petition and the statements therein contained are true; I was associated with Seymour P. Edgerton, Attorney at Law and Registered Practitioner before said Commission, during the progress of said proceedings before said Commission and prepared and signed, with Mr. Edgerton, certain of the papers and briefs which were filed in support of petitioner's contentions before said Commission; said Seymour P. Edgerton was then senior counsel for petitioner in said proceedings, but he is now on the legal staff of War Shipping Administration and I have become counsel for petitioner in his stead.

Charles S. Bolster.

Subscribed and sworn to at said Boston this twenty-first day of June, 1943, before me, Miles Wam——, Notary Public. My Commission expires March 17, 1945. (Seal.)

[fol. 94] [File endorsement omitted.]

[fol. 95] Secretary's Certificate to following transcript omitted in printing.

Filed May 21, 1941

APPLICATION

For

☐ CERTIFICATE AS COMMON CARRIER BY WATER

☒ PERMIT AS CONTRACT CARRIER BY WATER

SUBJECT TO THE INTERSTATE COMMERCE ACT

(Before answering, read general instructions attached hereto.)

BEFORE THE INTERSTATE COMMERCE COMMISSION

Application of CORNELL STEAMBOAT COMPANY
(Name) (Trade Name)

a corporation under the laws of the State of New York
(Status as individual, partnership, association, corporation, fiduciary, etc. If a corporation, name the State of incorporation. If a partnership, give names and addresses of all partners. If an association or corporation, attach a list of names and addresses of directors and officers.)

22 Ferry Street, Kingston, New York
(Street address) (City) (State)

Application below is for the appropriate authority to: (check applicable status)

☒ to continue an operation in existence January 1, 1940, and continuously thereafter } ☐ common carrier } ☐ passengers

☐	in existence January 1, 1940, and continuously thereafter	☐ common carrier	☐ passengers
☐	to continue an operation not existing January 1, 1940, but existing February 1, 1941	☒ contract carrier	☒ property

as a ... of

by water in interstate or foreign commerce (as defined in section 302(i))

Application for certificate as common carrier of property covers

☐ all commodities

☐ commodities with exceptions as detailed in Exhibits "A" or "B"

Application for a contract carrier permit of property covers

☒ all commodities with exceptions as detailed in Exhibits "A" or "B"

☐ specific commodities as detailed in Exhibits "A" or "B"

Application covers ☐ regular routes

☒ irregular routes

96

BMC 2b

71

Operation is ☒ year around in New York Harbor

☒ seasonal between March (month) and December (month).
on Hudson River

In support of this application, applicant submits the following exhibit attached hereto and made a part hereof:

☒ Exhibit "A" ☐ Exhibit "B"
(See General Instructions)

Applicant will furnish such additional information to substantiate the applicant's prayer as the Commission may require.

Applicant has complied with the order of the Commission relative to the service on interested parties, as shown below.

Applicant reserves the right to claim exemption from any and all provisions of Part III of the Interstate Commerce Act, the filing of this application not being deemed a waiver thereof, and the operations, if any, which applicant believes to be exempt are those described below:

(If exemption is claimed in respect of any operations applicant should here describe such operations, and in each instance make reference to the statutory provision or provisions under which the exemption is claimed)

This application is filed without prejudice to applicant's contention that it is not a carrier and does not transport any passengers or property and that for the foregoing reasons and other reasons it is not subject to Part III of the Interstate Commerce Act.

WHEREFORE, The applicant herein prays: That the Commission issue a permit (Certificate)(Permit) to operate as a (Common Carrier) contract carrier of property generally (Contract Carrier (Passengers)(Property generally, or with exceptions, or specific commodities only, as detailed in Exhibits "A" or "B")

and applicant further prays that if the facts herein contained show that applicant, although applying for a permit (Certificate)(Permit), is entitled to a certificate (Permit)(Certificate), this application be considered one for the appropriate form of authority.

Dated this 16th day of May, 1941.

CORNELL STEAMBOAT COMPANY
(Applicant)

By Irving Corkindall (Title) President

97

OATH

State of NEW YORK } ss:
County of NEW YORK }

FREDERICK COYKENDALL makes oath and says that he
(Name of affiant)

is the President of the Cornell Steamboat Co.; that he
(Title of affiant) (Name of applicant)
is authorized on the part of said applicant to verify and file with the Interstate Commerce Commission this application and exhibits attached hereto and made a part hereof; that he has carefully examined all of the statements contained in such application and the exhibits attached thereto and made a part thereof; that he has knowledge of the matter set forth therein, and that all such statements made and matters set forth therein are true and correct to the best of his knowledge, information, and belief.

Frederick Coykendall

Subscribed and sworn to before me, a notary public in and for the State and county above named, this 16th day of May, 1941.

(SEAL)

Lucia Davis.
NOTARY PUBLIC
ROCKLAND COUNTY
CERTIFICATE FILED IN NEW YORK COUNTY
CLERK'S No. [illegible] REGISTER'S No. 3F201
TERM EXPIRES MARCH 30, 1943

My commission expires _____

CERTIFICATE OF SERVICE

A copy of this application has been served by receipted mail on the Governors of the following States:

NEW YORK and NEW JERSEY

A notice of the filing of this application (Form B.W.C. 5) has been served by receipted mail on the following known water-line competitors:

See "Schedule I" annexed hereto

Postal receipts or certificates of mailing covering the above are attached hereto.

Date May 20th 1941. Signed Cornell Steamboat Company

By Frederick Coykendall
President

BWC 24

th provisos of section 309(a) or 309(f) of the Interstate Commerce Act.)

CORNELL STEAMBOAT COMPANY
(Name of Applicant)

Except as otherwise noted, the following information is to be as of January 1, 1940. The information given should, where necessary, cover a sufficient period prior to such date to give a clear and fair picture of the nature and extent of the business of applicant which properly should be covered by the certificate or permit sought. Wherever changes in the nature or extent of the operation have been made since January 1, 1940, they should be clearly indicated.

DESCRIPTION OF TRANSPORTATION SERVICE, ROUTES, PORTS SERVED REGULARLY AND IRREGULARLY, AND OTHER PERTINENT INFORMATION

I. DESCRIPTION OF TRANSPORTATION SERVICE:

A. Applicant (or predecessor in interest) was engaged in the business of transporting, in interstate or foreign commerce:

(1) ☒ Commodities generally.

(2) ☐ Commodities generally, except _____ (Indicate exceptions, either specifically or by their general nature)

(3) ☐ Special commodities _____ (Indicate specifically commodities transported).

(4) ☐ Passengers.

B. Applicant (or predecessor in interest) undertook to transport passengers or property for the general public for hire. No (Yes or No). If answer is "No", state for whom applicant (or predecessor in interest) transported since January 1, 1940, or prior thereto, under special contracts or agreements:

Name	Address (Street, City and State)	Written or Verbal Contract or Agreement and Date Thereof
(1) Christie Scow Corp.	70 Pine Street, N.Y., N.Y.	Verbal
(2) The Hutton Company	Kingston, N.Y.	Written
(3) McLain Marine Corp.	17 Battery Place, N.Y.	N.Y. Verbal
(4) Republic Steel Corp.	Cleveland, Ohio	Written
(5) Wright & Cobb. Ltge Co.	17 Battery Place, N.Y.,	N.Y. Written
(6) M & J. Tracy, Inc.	1 Broadway, N.Y.,	N.Y. Verbal

and others

Commodity Covered	Volume Agreed to be Transported	Duration of Contract or Agreement
(1a) Crushed stone and other commodities	Any amount	Season of 1941
(2a) Brick	" "	"
(3a) Any commodity (Erie Canal)	" "	"

(If any of the same contract referred to on lines (1), (2), (3), etc.)

C. Applicant (or predecessor in interest) has continued to operate as above stated without any change in the transportation service as described above and is now so operating. Yes (Yes or No) If answer is "No", state in detail character and extent of such change in service._____

_____

_____

D. If the changes indicated in the answer to (C) above represent interruptions of transportation service since January 1, 1940, caused by conditions over which applicant (or predecessor in interest) had no control, give facts and reasons clearly and in detail._____

_____

_____

E. Applicant (or predecessor in interest) is engaged in furnishing seasonal transportation only. No (Yes or No) If the answer is "Yes", state the limits of the seasonal operation, naming month of commencement and month of cessation.

_____

If the above seasonal period does not include January 1, 1940, was applicant (or predecessor in interest) rendering above service during the seasonal period ending prior to that date? _____ (Yes or No) Was applicant (or predecessor in interest) providing same service during seasonal period subsequent to January 1, 1940? _____ (Yes or No) Outline fully any changes in character and extent of service between seasonal operation including, or prior to, January 1, 1940, and subsequent seasonal operation: _____

_____

_____

_____

II. DESCRIPTION OF ROUTES:

A. Regular Routes:

Ports or points to or from which applicant (or predecessor in interest) regularly operated as of January 1, 1940, or prior thereto, and number of revenue calls at each between January 1, 1940, and date of application:

B. Irregular Routes:

Ports or points to or from which applicant (or predecessor in interest) offered occisional but irregular service as of January 1, 1940, or prior thereto, and number of

Usually applicant's towing services are suspended in the Hudson River on account of ice from approximately December to March. Its services are rendered 12 months in the waters of New York Harbor and the waters adjacent to New York City. Applicant furnishes towage services to and from and between Waterford, N.Y., and New York City, N.Y., and the Harbor of New York and the waters about New York City and all intermediate points.

C. Has applicant (or predecessor in interest) acquired by purchase or otherwise a route or routes since January 1, 1940? No (Yes or No) If so, attach statement, properly designated, giving, for each such route, the information requested in A and B above, also name and address of predecessor. Attach copy of purchase agreement, or other documents, evidencing the acquisition of each such route or routes.

D. Does applicant apply for rights over any route or routes operated by others under agreement? No (Yes or No) If so, attach statement, properly designated, giving, for each route, the information requested in A and B above, also name and address of operator. Attach copy of charter, operating contract, or other agreement.

E. Does applicant apply for rights over any route or routes over which it operates ships owned by others under charter, contract, or other agreement? No (Yes or No) If so, attach statement, properly designated, giving, for each such route, the information requested in A and B above, also name and address of the other party to such charter, contract, or agreement. Attach copy of such charter, contract, or agreement.

F. Has applicant (or predecessor in interest) abandoned or disposed of by sale or otherwise any route or routes since January 1, 1940? No (Yes or No) If so, attach statement, properly designated, giving, for each such route, the information requested in A and B above, the manner and date of disposition, and name and address of successor, if any. Attach copy of the sales agreement or other documents evidencing such disposal.

G. Were operations on any of the above routes or parts of such routes covered by answer to questions C, D, E, or F seasonal? None (Yes or No) If so, attach statement, properly designated, giving facts clearly and in detail, showing applicant's customary operation (or that of predecessor in interest), including months of normal operating season.

H. If applicant (or predecessor in interest) is subject to Part III of the Interstate Commerce Act in transportation of passengers or property in interstate or foreign commerce only by reason of participation in through routes and joint rates, name carriers with whom such traffic was interchanged as of January 1, 1940, or prior thereto, and interchange points: None

State clearly any changes since January 1, 1940:
None

III. DESCRIPTION OF EQUIPMENT:

A. Total number of vessels in commission and operated by applicant (or predecessor in interest) as a common or contract carrier on January 1, 1940, including vessels owned, chartered, or leased from others. 5 tugboats
(1) Number of owned vessels operated by applicant (or predecessor in interest) 5 tugboats
(2) Number of vessels under charter to applicant (or predecessor in interest) None
(Answers to (1) and (2) should total answer to (A))

B. Number of vessels owned by applicant (or predecessor in interest) and under charter to others on January 1, 1940.
None

C. Total number of vessels in commission and operated by applicant (or predecessor in interest) as a common or contract carrier on date of this application, including vessels owned, chartered, or leased from others 10 tugboats
(1) Number of owned vessels operated by applicant (or predecessor in interest) 10 tugboats
(2) Number of vessels under charter to applicant (or predecessor in interest) None
(Answers to (1) and (2) should total answer to (C))

D. Number of vessels owned by applicant (or predecessor in interest) and under charter to others on date of this application. None

IV. DUAL OPERATIONS:

A. Is applicant (or predecessor in interest) controlled by a person who has filed or intends to file a separate application for a certificate as a common carrier by water or a permit as a contract carrier by water? No (Yes or No) If answer is "Yes", state name and address of such person, and whether such person is applying for a common carrier certificate or contract carrier permit.

Was applicant (or predecessor in interest) so controlled on January 1, 1940? No (Yes or No)

B. Does applicant (or predecessor in interest) control a person who has filed or intends to file a separate application for a certificate as a common carrier by water or a permit as a contract carrier by water? No (Yes or No) If

answer is "Yes", state name and address of such person, and whether such person is applying for a common carrier certificate or contract carrier permit. _____

Did applicant (or predecessor in interest) control such person on January 1, 1940? No (Yes or No)

C. Is applicant (or predecessor in interest) under common control with a person who has filed or intends to file a separate application for a certificate as a common carrier by water or a permit as a contract carrier by water? No (Yes or No) If answer is "Yes", state name and address of such person, and whether such person is applying for a common carrier certificate or contract carrier permit.

Was applicant (or predecessor in interest) under such common control on January 1, 1940? No (Yes or No)

V. EVIDENCE OF OPERATION:

A. Applicant submits the following evidence as proof of its operations (or those of predecessor in interest) as of January 1, 1940:

Affidavit of Harry H. Flemming annexed hereto.

(Applicant should list above the documents it is attaching in the form of affidavits, bills of lading, schedules, or other documents which it believes sufficiently prove the maintenance of service as stated.)

B. Applicant submits the following evidence as proof of its operations (or those of predecessor in interest) on the date of this application:

Affidavit of Harry H. Flemming annexed hereto.

(Applicant should list above the documents it is attaching in the form of affidavits, bills of lading, schedules, or other documents which it believes sufficiently prove the maintenance of service as stated.)

The foregoing answers in this Exhibit A are made by the applicant without prejudice to its contention that in its performance of towage services for hire it is not a carrier and does not carry or transport any property or passengers, and that it is not subject to the Act.

84

"SCHEDULE I"

Card Towing Line,Inc.	17 Battery Place,N.Y.,N.Y.
Moran Towing & Transportation Co.Inc.,	17 Battery Place, N.Y.,N.Y
Russell Bros. Towing Company,Inc.	51 Madison Avenue,N.Y.,N.Y.
W.E.Hedger Transportation Corporation	120 Wall Street, N.Y., N.Y.
O'Donnell Transportation Company, Inc.	44 Whitehall Street, N.Y.,N.Y.
McLain Marine Corporation,	17 Battery Place, N.Y.,N.Y.
Murray Transportation Company	17 State Street, N.Y., N.Y.

64

STATE OF NEW YORK :
ss
COUNTY OF ULSTER :

HARRY H. FLEMMING, being duly sworn, says:

I am Secretary of Cornell Steamboat Company, and have held that position for upwards of 28 years. The said Cornell Steamboat Company is a corporation under the laws of the State of New York, with a principal office for the transaction of business at No. 22 Ferry Street, Kingston, N.Y.

I know of my own knowledge that Cornell Steamboat Company on January 1st, 1940 and previously thereto was engaged in the furnishing of towage services for hire to and from and between Waterford, N.Y., and New York City, N.Y., and the Harbor of New York and the waters about New York City.

I also know of my own knowledge that at all times since January 1st, 1940, Cornell Steamboat Company has been and still is engaged in the said business hereinabove stated.

Sworn to before me
this 10th day of May, 1941

Notary Public, Ulster County,
N. Y.

Received from:
KIRLIN, CAMPBELL, HICKOX, KEATING & GRAHAM
120 Broadway New York
One piece of ordinary mail addressed
to His Excellency the Governor of New York State
Executive Office
Albany New York
THIS RECEIPT DOES NOT PROVIDE FOR INDEMNIFICATION
POSTMASTER.

Received from:
KIRLIN, CAMPBELL, HICKOX, KEATING & GRAHAM
120 Broadway New York
One piece of ordinary mail addressed
to His Excellency the Governor of the State of New Jersey
Executive Office
Trenton New Jersey
THIS RECEIPT DOES NOT PROVIDE FOR INDEMNIFICATION
POSTMASTER.

Form 3817
Rev. 9-37
Post Office Department
Received from:
Cornell Steamboat Company
22 Ferry St. Kingston, N.Y.
One piece of ordinary mail addressed
to Murray Transportation Co. Inc.
17 Battery Place
New York City
THIS RECEIPT DOES NOT PROVIDE FOR INDEMNIFICATION
POSTMASTER.

Form 3817
Rev. 9-37
Post Office Department
Received from:
Cornell Steamboat Co.
22 Ferry St. Kingston, N.Y.
One piece of ordinary mail addressed
to Clark Towing Corp.
17 Battery Place
New York City
THIS RECEIPT DOES NOT PROVIDE FOR INDEMNIFICATION
POSTMASTER.

Form 3817
Rev. 9-37
Post Office Department
Received from:
Cornell Steamboat Co.
22 Ferry St. Kingston, N.Y.
One piece of ordinary mail addressed
to Cornell Steamboat Towing Co. Inc.
51 Madison Ave
New York City
THIS RECEIPT DOES NOT PROVIDE FOR INDEMNIFICATION
POSTMASTER.

Form 3817
Rev. 9-37
Post Office Department
Received from:
Cornell Steamboat Co.
22 Ferry St. Kingston, N.Y.
One piece of ordinary mail addressed
to Murray Transportation Company
17 State St.
New York City
THIS RECEIPT DOES NOT PROVIDE FOR INDEMNIFICATION
POSTMASTER.

Form 3817
Rev. 9-37
Post Office Department
Received from:
Cornell Steamboat Company
22 Ferry St. Kingston, N.Y.
One piece of ordinary mail addressed
to N.E. Heger Transportation Corp.
120 Wall St.
New York City
THIS RECEIPT DOES NOT PROVIDE FOR INDEMNIFICATION
POSTMASTER.

Form 3817
Rev. 9-37
Post Office Department
Received from:
Cornell Steamboat Co.
22 Ferry St. Kingston, N.Y.
One piece of ordinary mail addressed
to O'Donnell Transportation Co. Inc.
44 Whitehall St.
New York City
THIS RECEIPT DOES NOT PROVIDE FOR INDEMNIFICATION
POSTMASTER.

Form 3817
Rev. 9-37
Post Office Department
Received from:
Cornell Steamboat Co.
22 Ferry St. Kingston, N.Y.
One piece of ordinary mail addressed
to McAllen Marine Corporation
17 Battery Place
New York City
THIS RECEIPT DOES NOT PROVIDE FOR INDEMNIFICATION
POSTMASTER.

[fols. 107-116] Petition to dismiss application omitted. Printed side page 16 ante.

[fols.117-118] BEFORE THE INTERSTATE COMMERCE COMMISSION

W-359

In the Matter of The Petition of Cornell Steamboat Company to dismiss its application for a permit under Section 309 (f) of Part III of the Interstate Commerce Act.

Statement of Evidence

Hotel St. George, Brooklyn, N. Y., Friday, October 3, 1941, 10 a. m. E. S. T.

(Met pursuant to notice.)

Before: Examiner Wilkins.

APPEARANCES:

Robert S. Erskine, Esq., appearing for Cornell Steamboat Co., Applicant, 120 Broadway, New York, N. Y.

Stanley Carpenter, Esq., 143 Liberty Street, New York, N. Y., appearing for Rail Carriers in Official Classification Territory, Protestants.

Reginald G. Narelle, 24 Stone Street, New York, N. Y., appearing for Northeastern Inland Waterways Association, Inc., Intervenor.

[fol. 119] PROCEEDINGS

Exam. Wilkins: The Interstate Commerce Commission has assigned for hearing at this time and place Docket W-359, Application by Cornell Steamboat Company, for a permit as a contract carrier by water.

As the Examiner understands it, this applicant has also filed a petition for dismissal of this application, which will be included as a part of the record under which the hearing today is to be held.

Who appears for the applicant?

Mr. Erskine: Robert S. Erskine, 120 Broadway, New York City. I am admitted to practice before the Commission.

Exam. Wilkins: Are there any appearances for intervenors in support of or in opposition to the application?

(No response.)

Exam. Wilkins: Apparently there are no other appearances. The applicant may proceed.

Mr. Erskine: May I ask that Mr. Coykendall be sworn as a witness?

FREDERICK COYKENDALL, was sworn, and testified as follows:

Direct examination.

By Mr. Erskine:

Q. Mr. Coykendall, are you president of Cornell Steamboat Company?

[fol. 120] A. I am.

Q. And approximately how long have you held that position?

A. 29 years.

Q. In what state is Cornell Boat Company incorporated?

A. New York.

Q. Is the Cornell Steamboat Company—the present corporation—an offshoot, so to speak, of other previous companies or concerns?

A. The corporation was started in 1878 as a continuation of a business started by my grandfather in 1837.

Q. During all of that time down to date, who has owned Cornell Steamboat Company and its predecessors?

A. The same family—my grandfather and his son-in-law and his family.

Q. And the corporation is still owned in the family today?

A. Completely.

Q. In a general way, what type of vessel does Cornell Steamboat Company own and operate?

A. Towboats only.

Q. Some of them are steam tugs, and some Diesel engines?

A. Some are steamers, some are Diesels.

Q. Does Cornell Steamboat Company carry, or has it ever carried, on those tugboats, any freights or cargoes of merchandise for hire?

A. None whatever.

[fol. 121] Q. Or passengers?

A. No.

Q. Does Cornell Steamboat Company own or operate any other type of vessel than those tugboats?

A. None, except in connection with its repair equipment —we own a scow, too.

Q. Does Cornell Steamboat Company own or operate any barges or lighters or similar type of carrying craft?

A. None whatever.

Q. What services does Cornell Steamboat Company render through the tugboats?

A. Towing services—anywhere on the Hudson River and in New York Harbor.

Q. Are those the limits of the waters on which you render those services?

A. Yes.

Q. When you say the Hudson River, what are the termini?

A. Troy—we occasionally go to Waterford—Waterford is as far as we ever go.

Q. That is above Troy?

A. Between the Troy lock and the entrance to the Erie Canal—that part of the Hudson River.

Q. In connection with the towing on the Hudson River as far north as Waterford, are you able to operate 12 months of the year?

[fol. 122] A. No.

Q. Why?

A. Ice forms somewhere around the first part of December, and we open again about March 15th.

Q. That is with respect to the upper part of the river?

A. All the way down—in fact, all the way to New York.

Q. Is there any set date at which you terminate or begin the services on that part of the river?

A. No. Whenever the ice lets us, we start; and whenever it stops, we close.

Q. Now, with respect to any towing services in the Harbor of New York, what waters do you refer to or have in mind?

A. All the limits of New York Harbor.

Q. East River——

A. East River, North River, Staten Island.

Q. Do you do any towing services beyond or through Hell Gate and into the Sound?

A. No. Let's see—we go as far as Flushing occasionally.

Q. You do not go outside the Narrows, on the ocean?

A. No—not the Narrows or down the Sound.

Q. On what basis of arrangements or agreements are your towing services rendered?

A. Most of it is done by personal agreements with customers.

Q. Can you explain that a little more in detail?

[fol. 123] A. The largest part of our business is done on time contracts entered into for a period of years. Then we have other arrangements that run for a single year. Then we have a small amount of what I might call miscellaneous business, quoted from day to day.

Q. In connection with those miscellaneous jobs, on what basis are they done? How is the arrangement made?

A. A man calls up and wants to know what it will cost to take a boat from such a place to such a place. We give him the price to take it.

Q. In each instance, then, whenever you tow, it is done on an agreement with respect to that job, whether over a season or for the individual job?

A. Exactly. It may be that some of these men give us two or three jobs a year, and they know what the previous prices were, and they rely on that to be the price at the next job.

Q. In a general way, these individuals or companies who contract for your services operate what kind of vessels?

A. Scows and deep boats, as we call them—carrying the cargo in the hold.

Q. The scows carry cargoes on deck?

A. That is right.

Q. And the deep boats carry the cargoes under deck?

A. That is right.

[fol. 124] Exam. Wilkins: Could a deep boat be considered a barge?

The Witness: It is a barge; that is another name for the same thing.

By Mr. Erskine:

Q. Are there types of boats sometimes known as canal boats? Do you tow them on the river?

A. Canal boats now are practically no different from deep boats. The canal boat is a small-sized deep boat. In the old days, canal boats were about 250 tons, but now they run to 600 or more.

Q. And those vessels carry cargo, do they?

A. Yes.

Q. In your arrangements for towing services, and in making the contracts that you describe, with whom do you deal?

A. The owner of the boat.

Q. Do you have any dealings or any agreement of any sort with the owner's shippers or consignees of any cargoes on those boats?

A. No—well, except where the cargo is owned by the same man as owns the boat.

Q. But in dealing with him, does the cargo enter into your dealings at all?

A. Except as to its size—that is all.

Q. Does Cornell Steamboat Company have anything to do in connection with any agreement as to the amount of [fol. 125] freight or other charges paid by the owners or shippers of cargo to the owner of the barge or scow which carries it?

A. Nothing to do, and no knowledge of it.

Q. In making your contracts for towage services, does your charge in any way relate or have any connection with any freight moneys paid by the owner of the cargoes to the owner of the barges or scows?

A. Not at all.

Q. Against whom does your bill lie for the towage services rendered?

A. The owner of the barge.

Q. When you submit a bill, does it name the boats which have been towed?

A. Yes.

Q. And is there any notation put on the bill as to any lien or security for your services?

A. The barges are liable for the towing—the individual barges.

Q. Subject to a lien, a maritime lien?

A. Yes—unless we have notice beforehand that the operator of the barge does not own it.

Q. If he does not own the barge, what conditions are you referring to?

A. We are relying on his credit. Where a man charters a barge owned by another man, we rely on the charterer's [fol. 126] credit rather than the credit of the barge.

Q. You spoke once before about the fact that your contracts and agreements were made with the owners of these barges and scows. Do you mean also to include the charterers who operate them?

A. Yes. An owner may charter a few extra scows, and we include those in his contract.

Q. Does Cornell Steamboat Company advertise in any daily papers or trade journals, holding out any offer of towing services?

A. No. I think we have one slip in the Bullinger's Guide. We have had that for many years; it simply announces towing services.

Q. Does Cornell Steamboat Company, in any public notice such as you have mentioned, quote any towing rates or any offer?

A. No.

Q. Does Cornell Steamboat Company have anything to do with any arrangements between the owners or shippers of the cargoes and the owners or charterers of the barges and scows, as to where or how the cargo is to be moved?

A. We have no arrangement with anybody except the owner of the barge or his representative, who tells us where the barge is to go.

Q. When the owner or charterer of the scows or barges [fol. 127] is negotiating with the shipper or owner of the cargoes as to the terms of carriage and where it is to be carried, you have nothing to do with that?

A. We don't hear of it until after.

Q. You have no knowledge of it?

A. No knowledge of it.

Q. In connection with any of the towage services rendered by Cornell Steamboat Company, does your company issue any bill of lading or similar document with respect to the cargoes on the boats towed?

A. None at all.

Q. When your tugboats furnish these towage services to the barges or scows, how do the tugs make fast—in a general way—to the boat?

A. It depends on the number of boats to be towed at one time.

Q. What I mean is this: The tug, in a general way, puts out lines?

A. Yes.

Q. And furnishes the power to move those boats from point to point?

A. That is right.

Q. While Cornell's tugs are rendering those services, do the captains or any other men on your tugboats have anything to do with the cargoes on the boats in the tow?

[fol. 128] A. Not at all.

Q. Do those boats in the tow have any captains or crews on them?

A. Each has its own captain.

Q. Is that captain in any way in Cornell Steamboat Company's employ?

A. Not at all.

Q. In arriving at the rates or charges for which Cornell contracts to furnish its various towage services, have you any interest in, or any connection with, the rates of freight paid by the cargoes to the owners of the barges or scows?

A. None at all. We have no knowledge of it, in fact.

(Discussion off the record.)

Mr. Carpenter: May I at this time enter my appearance?

Exam. Wilkins: In this case, the case of the Cornell Steamboat Company?

Mr. Carpenter: Yes.

Exam. Wilkins: Are you for the applicant?

Mr. Carpenter: No, we represent protestants.

Exam. Wilkins: An intervener in opposition?

Mr. Carpenter: Yes.

Exam. Wilkins: Who is the intervenor?

Mr. Carpenter: Rail Carriers in Official Classification [fol. 129] Territory.

Exam. Wilkins: Will you give your name?

Mr. Carpenter: Stanley Carpenter, 143 Liberty Street, New York City, representing the Rail Carriers in Official Classification Territory. I am a practitioner before the Interstate Commerce Commission.

Mr. Narelle: Reginald G. Narelle, 24 Stone Street, New York City, President of Northeastern Inland Waterways Association. I am admitted to practice before the Commission.

Exam. Wilkins: You are an intervenor?

Mr. Narelle: Yes, sir.

Exam. Wilkins: Taking what position?

Mr. Narelle: More or less as amicus curiae. I don't know whether we will be opposing the applicant until we see what the record develops.

Exam. Wilkins: Very well.

By Mr. Erskine:

Q. Does Cornell Steamboat Company invariably perform towage services for any person or company that requests them?

A. No, not always.

Q. Are there times when you decline the request?

A. There are.

Q. Can you indicate in a general way some of the reasons for declining?

[fol. 130] A. There might be various reasons. One might be unsatisfactory credit experience. One might be the condition of the property to be towed. Another might be whether we can do it without injuring our other customers —our regular customers—because they come first.

Q. Are there occasions, or have there been occasions, when Cornell Steamboat Company refuses to perform those services requested unless the owner of the barge or the scow to be towed gives you a release from all liability, including negligence?

A. That frequently happens.

Q. Now, you described your towing services as rendered on the Hudson River and in the Harbor of New York. I assume that that means that the services may be between different points on those waters?

A. Anywhere.

Q. And how are those points determined? Under the instructions of the owner or charterer of the barge or scow?

A. Exactly.

Q. When your tugs tow the boat to the place designated, have you anything further to do with the boat or any cargo on board of her?

A. After she has landed, we are through.

Q. Do you have any interest—or, in many cases, do you [fol. 131] have any knowledge—of the fact as to where the boat or the cargo on board of her may be going after you finish your towing service?

A. We have none at any time.

Q. In the same way, do you know, or do you lack knowledge of, where the boat or the cargo may have come from in some cases when you undertake to tow them on the river?

A. The boat has to come from the place we pick it up at. The cargo——

Q. When you pick it up somewhere on the river, are there occasions when you may not know where it has previously come from, or its cargo?

A. If the boat is out of the canal, we wouldn't know.

Q. When you finish the towing service which you undertake to perform by landing the boat at destination, does Cornell Steamboat Co. have anything to do with any further arrangements to move the boat anywhere else?

A. After our job is done, that is all.

Q. In every instance when you undertake to furnish towage services, as you have described them, do you know what cargo is on the barge or scow to be towed?

A. Sometimes—and sometimes not. Very frequently, not.

Q. Will you tell me whether the bulk of the towage services you have described is furnished by the tugs of Cornell Steamboat Company between points in the state of New [fol. 132] York or outside the state of New York?

A. 95 per cent of it goes between points in the state of New York—over 95 per cent.

Q. The other percentage goes where outside of New York?

A. To New Jersey. That is within the limits of New York Harbor.

Q. In other words, there are some cases of boats which you tow under the arrangements described, which come down the river from a point in New York and are delivered in New Jersey, in the area of New York Harbor?

A. Exactly.

Q. I think you said something awhile back about quantity of cargo in connection with your towing rate. Will you describe how the quantity of cargo enters into the towing rate in any way?

A. The price of the barge is based upon her size and the cargo she carries.

Q. And why does the size of the barge enter into the towing rate?

A. That regulates her cargo—the size of the barge regulates her cargo.

Q. In performing the towage service, how does the size of the barge affect the towing charges? I mean, whether it is a 500-ton barge or a thousand ton barge.

A. The larger the unit, the smaller the rate.

[fol. 133] Q. And it is in that way that the size of the boat and the quantity of cargo which it can carry enters into your arrangement as to the rate?

A. Yes.

Q. But, outside of that, you have no interest in the cargo or the freight money?

A. None at all. For instance, a 2,000-ton barge per ton would be less than a 200-ton barge per ton.

Q. Is Cornell Steamboat Company self-insured with respect to the towage services which it renders?

A. Yes.

Q. During the time that you have been president of the corporation, Cornell Steamboat Company has had numerous litigated matters which have gone to decision in the Federal Courts?

A. Yes—many.

Q. Can you tell us whether in any one of those cases, Cornell Steamboat Company or its tugs have ever been held to any liability as a carrier?

A. No—none.

Q. It has or has not?

A. It has not.

Q. In the petition filed by Cornell Steamboat Company in this matter, there is a statement in paragraph 6 that says: "Cornell owns a fleet of upwards of 33 tugboats of varying [fol. 134] size and power." Is that statement correct?

A. Right now, yes.

Q. And are they all in operation at one time, as a rule?

A. No—very seldom all at one time.

Exam. Wilkins: In order that the record may be clear on that, you are referring to paragraph 6 of the affidavit attached to the petition? Is that right?

Mr. Erskine: That is what I meant.

Exam. Wilkins: I note that there are paragraphs numbered in the petition itself, as well.

Mr. Erskine: That is so.

By Mr. Erskine:

Q. Have there been occasions in connection with the towing services you have described as rendered in past years, when, on the faliure of the owner of the boat or barge, you have been compelled to commence proceedings to collect your towing charges?

A. Often.

Q. The proceedings have been brought against the barge or scow or other vessel itself?

A. Yes.

Q. For enforcement of a maritime lien?

A. That is right.

Q. Those enforcements of liens have always been against the barges or boats?

A. Yes.

[fol. 135] Q. Have they ever, that you know of, been against the cargoes?

A. No.

Q. Do you have any knowledge of or any connection with, or do you take any part in, any arrangements between the owners or shippers of cargoes and any other persons, regarding through movements or through rates?

A. None whatever.

Q. The charges which you agree on with your customers for the towage services have no relation or connection with any through rate involved between the cargo and other parties?

A. None whatever.

Q. When you spoke a few minutes ago of 95 per cent. of your towage services being between points in the state of New York, was that statement based on a recent careful check of your records?

A. A check of the year 1940, yes.

Q. To your knowledge, was 1940 a fairly representative year?

A. Exactly. That is, representative of the last 10 years, I would say.

Q. You spoke of certain services rendered by Cornell's tugs to companies or individuals who own or operate the

scows or barges on which they carry their own merchandise? [fol. 136] Is that correct?

A. Yes.

Q. Is that a part of the total services that you render, or is it the bulk, or a big majority?

A. It is the bulk of it. It is probably over 70 per cent., I should say.

Q. In those cases, does Cornell Steamboat Company have any interest whatsoever in the actual commodities which are shipped by those customers?

A. No.

Q. Are your towing charges in those cases in any way connected with, or do they reflect in any way, any sales price of the commodities themselves?

A. We have no knowledge of that.

Q. So far as Cornell Steamboat Company is concerned, are the arrangements or the general basis of arrangements any different for such an individual company shipping its own commodities, but also owning and operating the boat, and the arrangements you would make with any other owner or operator of a boat? In other words, when you deal with those customers, do you deal with them as shippers of the cargo or as owner-operators of the boat?

A. Solely as owner-operators of the boat.

Q. And, aside from any arrangement in rates, depending on the volume or nature of the business, your dealings with [fol. 137] them are on the same basis as the dealings with any other owners or operators of boats?

A. The same.

Q. The mere fact that they are shipping their own merchandise in no way enters into your services or contracts?

A. We don't care where the merchandise comes from.

Q. Are some of your contracts which you described—particularly those over a period of time—entered into in writing?

A. The bulk of them, yes.

Q. Then are there others that are oral, made over the telephone or in person?

A. None would be made over the telephone. We have one or two oral contracts.

Q. Made in person?

A. Yes—made in person with the owner.

Mr. Erskine: Unless the Examiner wishes some further information, I think that will cover what we have in mind.

Exam. Wilkins: The Examiner would like to know whether you can present a copy of one of these contracts that you make which might be representative.

The Witness: I could. I can't now but I could.

Exam. Wilkins: Have you any objection to doing that?

The Witness: No.

Mr. Carpenter: Mr. Examiner, may I suggest that you [fol. 138] ask for a representative contract over this period?

Exam. Wilkins: Well, I asked for a contract which would be representative.

The Witness: Of what is going on now?

Exam. Wilkins: Yes. And I assume that that is the same as what you were doing just prior to January 1, 1940. Or is it?

The Witness: They have been the same for quite a number of years.

Mr. Erskine: May I ask a question there, as I would in any Court proceeding? I am sure that Mr. Coykendall has no objection to disclosing the terms of all these contracts—that is, the provisions and conditions—but if you required to disclose publicly now such rates as he may make with these customers, which is a business matter.

Exam. Wilkins: Well, all the Examiner wanted was a form filled in with "John Doe" or fictitious figures to indicate what is representative of the undertaking and the basis for your operation.

The Witness: I can give you that, yes.

Exam. Wilkins: Can that be furnished today, before the Examiner leaves?

The Witness: What time are you going to leave? It is a question of running up to the office and getting it.

Exam. Wilkins: I have another case after this one closes. [fol. 139] I expect to be here until 7 o'clock tonight, anyway.

The Witness: I think we can get it to you.

(Discussion off the record.)

Exam. Wilkins: There should be at least two copies, exactly alike. And these other parties probably would want a copy.

The Witness: Take a contract and just substitute "John Doe" and then go on with the rest of the contract, and leave out the specific price, for instance, on a specific boat?

Exam. Wilkins: That is right—or whatever basis for the price you have.

Mr. Erskine: It would be a little easier, I think, if we could mail that to you. Could we mail it to you?

Exam. Wilkins: I would rather have it in the record today, if we can. We are not supposed to give an exhibit number unless we actually put it in the record.

Mr. Erskine: It will take an hour to go from here to the office.

The Witness: We will telephone it up now and have it written up. That should not take half an hour, I think; they are not long.

Exam. Wilkins: If you will do that, I would be glad to have it.

There are one or two other questions I should like to [fol. 140] ask. Do you ever charter one of these tugs to some other person who operates?

The Witness: We have, in previous years. We haven't done it, I guess, for 5 or 6 years. We wouldn't now, anyway.

Exam. Wilkins: You would not perform that sort of a service today?

The Witness: That is not a part of our business. We have heretofore, as I say, but we haven't done it recently.

Exam. Wilkins: You said that the price for your services had nothing to do with the cargo, but you had some statement with respect to the capacity of the barge or scow. Wouldn't it have something to do with how much weight the cargo was?

The Witness: It is the weight of the cargo.

Exam. Wilkins: And not whether it actually occupied the entire space?

The Witness: That is just exactly the point. We base our rate on the weight of the cargo on the barge, and the size of the barge determines how much weight she can carry, and we estimate our own cargo by seeing the freeboard on the boat. We know how much she has got on.

Exam. Wilkins: In other words, if the cargo consisted of sand or gravel or steel, they wouldn't have as much in as they would with a lighter commodity—but it would be [fol. 141] determined by the weight?

The Witness: The weight—how deep down the boat is down in the water. We know that.

Exam. Wilkins: Is there any cross examination of this witness?

Mr. Carpenter: May I interject something for just a moment? Do you intend that the parties of record will be furnished with copies of that contract to which you have just referred?

Exam. Wilkins: Yes, I have asked them to bring enough copies for the parties here.

Mr. Erskine: How many will that mean?

Exam. Wilkins: How many of you want copies?

Mr. Carpenter: I want one.

Mr. Narelle: So do I.

Exam. Wilkins: That will be four all together—two for the record, and two for the parties.

Mr. Erskine: May I ask another question on the record?

Exam. Wilkins: Yes.

By Mr. Erskine:

Q. On the last question that the Examiner put to you about the weight of the cargo, am I right or wrong in saying that the weight of the cargo is of interest to you simply because of the weight in the boat that is being towed?

A. Right.

Q. And does it make any difference to you what kind of [fol. 142] cargo it is, or whose cargo it is?

A. No, we don't care whose cargo it is. It is the depth of the boat in the water that we are after.

Q. I neglected to put in the record the routine question as to the home address of the Cornell Steamboat Company, the principal office.

A. Kingston, New York.

Q. And do you have an office at New York City?

A. Yes, we operate offices here.

Q. Where is that?

A. Foot of West 53rd Street.

Mr. Erskine: That is all.

Exam. Wilkins: Is there cross-examination?

Cross-examination.

By Mr. Carpenter:

Q. Mr. Coykendall, how long has Cornell Steamboat Company been in business?

A. Well, as I say, it was incorporated in 1878, as a continuation of a business started by my grandfather in 1837.

Q. Cornell Steamboat Company has been instrumental in developing considerable business on the Hudson, hasn't it?

A. I wouldn't think so. I don't think it has developed any business except its own.

Q. Its services have attracted traffic, too, haven't they?

A. I wouldn't say that. I don't think our services have [fol. 143] attracted anybody. It has been there, and we have supplied the need after it came.

Q. When you stated that 95 per cent of your business is destined to points within the limits of New York Harbor——

A. I said it was delivered to points——

Q. Delivered. Did you mean New York Harbor as described in ex parte 140?

A. I don't know what that is. It is whatever the limits of New York Harbor are in the I. C. C. determination.

Q. That is right. That includes points into Jersey?

A. Yes, that's right.

Mr. Erskine: Are you speaking of the 95 per cent. or the 5 per cent?

Mr. Carpenter: I am speaking of the 95 per cent.

The Witness: The 95 per cent. did not include the New Jersey points. Last year, 4.4 per cent. went to points in New Jersey. All the rest went to points in New York State.

By Mr. Carpenter:

Q. Within the range of your operation, with credit considerations being favorable, contents of the barges being what you think they should be, will you tow for anyone seeking your services?

A. We are likely to, yes.

Q. Do you tow any vessels for other operators or individuals on a percentage basis?

[fol. 144] A. No.

Q. You chose the year 1940, I understand, as being a representative year?

A. Of the last 10 years, I said.

Q. Of the last 10 years?

A. Yes.

Q. 1940 was representative of traffic for——

Mr. Erskine: May I suggest that you be clear about that? Mr. Coykendall was talking of the percentage of the movements intrastate and interstate. He said it was representative of that phase of the matter.

Mr. Carpenter: That is correct. That is what I am asking about.

By Mr. Carpenter:

Q. That was representative?

A. That was representative.

Mr. Carpenter: That is all.

Exam. Wilkins: Is there any further cross examination?

Mr. Narelle: Yes.

By Mr. Narelle:

Q. Your risks are not predicated in relation to the cargo itself?

A. Not at all. You mean, what the cargo is?

Q. The type of cargo.

A. No, it is not.

Q. Do you ever tow for the Buffalo Barge Towing Co.?

[fol. 145] A. I do now, yes.

Q. Do you tow on a percentage basis?

A. No.

Q. Did you ever?

A. No, never did.

Q. Never did?

A. No.

Q. This Bullinger's Guide that you speak of——

A. I had better change that a little bit. At one time, we had a base rate, and if the Buffalo Barge Company owned above a certain rate, we were to get a certain amount above that service, but that disappeared ten years ago.

Q. You have not performed that service in the last ten years?

A. No.

Q. Towing vessels where the owners of the vessels own the cargo—you perform that sort of service?

A. Oh, yes. In fact, most of our business is that kind of business.

Q. Most of your business?

A. Yes.

Q. And you do not know whether that cargo is in interstate commerce in its movements, or not?

A. We have no knowledge of where the cargo is going at all.

Q. You make no attempts to investigate whether it is in interstate commerce or not?

A. We know in a general way, but we have no official knowledge. We know that it is mostly New York State stuff.

Q. Are there any other companies towing on the Hudson River that give comparable service to your Hudson River towing?

[fol. 146] A. I wouldn't like to say that. That is for other people to say.

Mr. Erskine: I think that that question might be subject to a non-legal objection. It is a pretty broad question—what is meant by "comparable."

Exam. Wilkins: The Commission would like to know what your competition is.

The Witness: I think that we are the best towers on the Hudson River. We have competition of all kinds.

Exam. Wilkins: Does that answer your question, Mr. Narelle?

Mr. Narelle: Yes, we will concede that.

By Mr. Narelle:

Q. You have regular schedules of towing—flotilla towing—on the Hudson?

A. We try to satisfy a man's needs every day. We arrange, if a man wants a boat towed—we try to tow him the same — he gives us the order.

Q. But do you not have certain set days of the week in which you have tows leaving New York, on the one hand, and Albany, on the other?

A. Right.

Q. More or less set schedules?

A. Yes.

Q. And ordinarily a concern offering you towing services would have to wait perhaps a day sometimes to put their [fol. 147] barge in that particular tow?

A. That depends on whether they would want to wait for that tow or come down by themselves.

Q. If they want to come down by themselves, your towing service would be considerably higher?

A. Yes—higher than if they came with a lot of other boats.

Q. In the regular flotilla towing, your rates, based on the tonnage, are the same for each customer?

A. Right.

Q. And are there any other towing services on the Hudson River giving such flotilla towing schedules?

A. Well, let's see—practically all the canal operators run up and down with flotilla tows.

Q. Is it not a fact that the canal operators are towing their own vessels with their own power units?

A. And frequently some of ours, too.

Mr. Narelle: What I am trying to develop, Mr. Examiner, is the service on the Hudson River and the competition of the Cornell Steamboat Company.

Exam. Wilkins: The Commission would like to know, with respect to what this service is, whether it is in the nature of a common carrier service or whether it is in the nature of a contract carrier service. The answers that the witness gave to some of your questions would indicate that he maintains regular schedules on certain days of the week [fol. 148] between certain ports for general tow, and that those customers who can include their barges or scows in those tows get a different rate than those who ask for individual service at a particular time. The Examiner wants to get all the facts to determine whether there is any distinction between those services.

The Witness: There is. The customer who asks us to do work at our convenience and in our method gets one rate. If a man wants a single tug for a single barge, he gets an entirely different rate, and he makes an entirely different time. In other words, it is a different type of service.

Exam. Wilkins: Your application is for a permit as a contract carrier—that is, in case the Commission determines you have to have some authority—as distinguished from a common carrier. The Commission would also like to know the number of shippers that you serve, and what limitations you have on that service. In other words, just how is that limited so that you are a contract carrier, rather than a common carrier?

The Witness: As I said, about 70 per cent. of our business, I think, is done on regular contracts, and we agree in the contract to give a specific type of service to the customer.

Exam. Wilkins: How do you get these customers?

[fol. 149] The Witness: We know who they are. Of course, having been there since 1837, we pretty much know every manufacturer on the river. We go to him and ask him for a contract and show him what kind of service we can give him, and he gives us the contract.

Exam. Wilkins: Do some of them come to you?

The Witness: They may have in the early days, but they have been our customers for so long that the method of coming to us has almost been forgotten.

Exam. Wilkins: And you don't actually hold yourselves out to the general public?

The Witness: No, no.

Exam. Wilkins: You don't hold yourselves out to conduct towing services?

The Witness: We don't hold ourselves out at all. As a rule, we do take orders, as I mentioned. I think that 12 or 13 per cent. of our business is miscellaneous business. People will call up today and say that they want us to take a barge from here to there. We ask what kind of barge it is and how much it carries, and we give them a price, and we do that job. The rest is all by yearly or regular arrangements with customers, even down to the naming of the barge that they want towed.

Exam. Wilkins: On these operations where you have a tow leaving on certain days of the week from certain ports——

[fol. 150] The Witness: One every night from New York, we'll say.

Exam. Wilkins: (Continuing) —how do you determine the limits of the number of barges or scows that you will include in that tow?

The Witness: We practically have no limits; we take all that will come. One night, we may have 50 barges; the next night, we may have 5.

Exam. Wilkins: But when you say "all that will come," are those to come only from your individual——

The Witness: Individual customers or people who have made arrangements with us.

Exam. Wilkins: Ahead of time?

The Witness: Exactly.

Exam. Wilkins: It all must be arranged in advance?

The Witness: We must have the order for the barge before the barges leave the stake boat, as we call it.

Exam. Wilkins: You also indicated that you must know that the credit of the customer is good?

The Witness: We have some on the blacklist, whom we do not tow, because we know that they don't pay.

Exam. Wilkins: Are there any further questions of this witness?

Mr. Narelle: Yes.

By Mr. Narelle:

Q. On that question of the schedules, Mr. Coykendall, and [fol. 151] your statement that there is no limit——

A. To the number of boats in the tow.

Q. (Continuing) —to the number of boats in the tow, you also stated that arrangements must be made ahead of time. When you say that, do you mean ahead of the time of the scheduled leaving of the fleet?

A. That's right—ahead of that.

Q. But if there is some boat owner who may not have a yearly contract with you—and provided that the vessel and the cargo and the credit arrangement are satisfactory—you will tow his boat in that fleet?

A. Surely—if he gives us an order for it before the tow starts.

Mr. Narelle: Mr. Examiner, I want to make this statement for the record: We do not challenge the position of the applicant here, so far as his territorial rights are concerned. We are interested in developing all of the facts for the record here, to get a good record in these cases. For instance, as an example, if this applicant here should be held to be a common carrier, it is quite conceivable that he might be subject to regulation and not even have the exemption under 303-B, by reason of the amendment to the Intercoastal Act of 1933. For instance, if he is held to be a common carrier operating on the high seas from port to [fol. 152] port, in those instances where he is towing the barges for individuals who own the cargo, he would be subject to the regulations and would have to file his rates.

Exam. Wilkins: What is it that you are doing now? Are you arguing the point of law, or are you giving a basis for some questions?

Mr. Narelle: A basis for questions—to develop facts.

Mr. Erskine: May I interrupt? The witness has testified that they do not do any towing—any operations—on the high seas.

Exam. Wilkins: That is what the Examiner understood the witness to say—that they do not operate on the high seas at all.

Mr. Narelle: It is purely a question of what the high seas are.

The Witness: New York Harbor is not the high seas.

Exam. Wilkins: That is a matter for argument. He stated where he operated.

Mr. Narelle: I want to bring that fact out for the benefit of counsel for the applicant—that it might be raised.

Exam. Wilkins: Very well. Are there any further questions?

Mr. Erskine: May I ask a question?

Exam. Wilkins: If this gentleman is through.

[fol. 153] Mr. Narelle: I think we have covered all the points.

Exam. Wilkins: The Examiner would like to ask, in connection with that matter of the tows at regular sailing schedules, how much of the business which your company conducts is of that nature?

The Witness: Well, I should say 85 or 90 per cent. of it. It is nearly all that kind of stuff. We take an order today for a barge going, we will say, to Poughkeepsie; we put it in with other barges leaving here tonight, some going to Poughkeepsie, some going to Tarrytown, some going to Newburgh; and we execute that man's order tonight. We execute the order on the first night after we get it. We are supposed to leave here every night, as far as Poughkeepsie; and every other night, as far as Albany. That is the present schedule.

Exam. Wilkins: The regular schedule that you have?

The Witness: The present schedule.

Exam. Wilkins: How do you acquaint your customers with that fact, that you have that schedule?

The Witness: They just know it—just by habit—that's all. That is the custom.

Exam. Wilkins: Do you send them any circular at the beginning of the year, or anything like that?

The Witness: No. The business has been going on for so long that everybody knows it.

[fol. 154] Exam. Wilkins: The Examiner is just trying to get all the facts, to figure out whether there is any common carrier service in this, or whether it is strictly a contract carrier service.

The Witness: As I say, the type of service is specified in the contract that we make with the man; and after that, we have to live up to that.

Exam. Wilkins: You indicate that you may leave some of these barges or scows at one point on the route?

The Witness: Oh, yes—drop them off.

Exam. Wilkins: And others at other points?

The Witness: Yes.

Exam. Wilkins: Do you have any arrangements with any other operator towing, as to transferring a barge or a scow to a tow operated by some other operator——

The Witness: No, none at all.

Exam. Wilkins: When you speak of having tows leaving certain ports on certain days for certain destinations, do you operate over a particular route between those ports?

The Witness: Just the Hudson River—That's all. We come down the channel of the Hudson River between Albany and New York.

Exam. Wilkins: Is there anything further from this witness?

Mr. Erskine: I should like to try to add a little to this [fol. 155] description of the scheduled tows.

By Mr. Erskine:

Q. You speak of the towing of these tows every night, for instance, in fleets. I assume that the underlying fact is that, if you can tow a group of boats with two, three or four tugs, you can quote a lower rate than if you had to put a single tug on each boat towed? Is that right?

A. Exactly.

Q. That is understood and explained to your customers when you make the contract?

A. They all know that.

Q. Do you maintain a regularity of schedule whenever there is no business for those tugs of yours? In other

words, if there are no fleets of boats to go up the river, do you send your tugs up?

A. As a practical matter, we do, because we have to have them at the other end. There is nothing else for them to do, so we send them along, whether we have 5 or 50 boats in the tow.

Q. Is there a time in the season when you shorten or do not maintain——

A. In the fall of the year, yes.

Q. You do not send those tows out and try to maintain a schedule of sending them on an exact hour?

A. No, no; it may not get out until tomorrow morning [fol. 156] sometimes, or 9 o'clock tonight. The basis of the thing is the wording of the contract with the customer. In one of our contracts, we say that we agree to maintain a service nightly between New York and such a point, and that determines our obligation. As long as that obligation is in the contract, we have to do it.

Exam. Wilkins: Does that indicate to the Examiner, then, that the basis for this regularity is to take care of service of particular customers?

The Witness: Exactly. That is just what it is.

Exam. Wilkins: It is not, then, primarily a regular schedule to serve the general public?

The Witness: Not at all. It is based on——

Exam. Wilkins: But to take care of the particular customers who have traffic to these points?

The Witness: Exactly. And if, some night, the regular customer had all that we could handle and the other fellow did not, he would have to wait; the regular customer would go. Our obligation is to the contract made with the individual customer.

By Mr. Erskine:

Q. When you spoke of taking all the boats that were there to be towed, is it a fact that you can handle the varying numbers of the boats in a fleet by adding more or less tugs of varying power?

A. Oh, yes.

[fol. 157] Mr. Erskine: I think that is all.

Exam. Wilkins: Is there anything further from this witness?

By Mr. Narelle:

Q. For the record, Mr. Coykendall, the question of this time factor is determined more or less by the tide, isn't it?

A. Oh, yes.

Q. You said maybe 9 o'clock—or perhaps it was 2 o'clock. It is the tidal factors that really govern your leaving?

A. You try to get out of New York on the first of your flood tide.

Q. Do you tow for any concerns who have no specific contracts?

A. Not many large ones, no.

Q. I mean, many individuals.

A. A few, yes.

Q. Boat owners?

A. I would say that probably 12 or 13 per cent. of our business is not under contract.

Exam. Wilkins: You mean, not under written contract?

The Witness: Not under some arrangement or other. Over 60 per cent. is under written contract.

Mr. Erskine: Are you referring to a season contract?

The Witness: A season contract.

Mr. Erskine: But do you tow for anybody without having [fol. 158] an agreement with him before you tow the boat?

The Witness: No, that is an individual one-day arrangement. He gets a price this afternoon to take a boat from here to some other place. That is not a contract. That is just miscellaneous business.

Exam. Wilkins: The Examiner understood you to say that you make no agreements or contracts over the telephone; that, if it was oral, it had to be between the party and yourself.

The Witness: That is for season or term contracts. But you could call up today for 10 o'clock and ask the price for a barge from here to Newburgh. We would tell you, and that would be the end of it. It would not be any contract.

Exam. Wilkins: And that might be a person who did not have a season contract with you?

The Witness: Yes, it would be a person without a season contract. The other person has the provision in his contract. This just applies to the miscellaneous business that is not under contract—and that is a very small part.

Exam. Wilkins: Then you do operate a part of your business in connection with customers who are not under any written contract?

The Witness: Oh, yes—but, as I say, perhaps 12 per [fol. 159] cent. of it——

Mr. Erskine: Do you tow for any other than your regular season customers without having a definite agreement as to the particular price and terms for the particular job you are rendering?

The Witness: No, that is quite right. That is an agreement for that job.

Exam. Wilkins: But could it be entered into over the telephone?

The Witness: It could, yes.

Exam. Wilkins: Then would you enter into such an agreement with anybody that you had not had previous dealings with?

The Witness: We would want to know something about them. If it was out of the blue, we would want to know who he was, and what he had to go, before we would give him a price.

Exam. Wilkins: And what his responsibility was?

The Witness: Exactly.

Exam. Wilkins: You would make all those inquiries?

The Witness: Oh, yes.

Mr. Erskine: And on occasions of those types, have you in the past refused the towing?

The Witness: Yes, yes.

Exam. Wilkins: Do you require a pre-payment?

[fol. 160] The Witness: No—well, we might if the fellow was good in every respect except his credit. Then we might say, "Pay us in advance, and we will take it." We have done that.

Exam. Wilkins: Is there anything further from this witness?

Mr. Narelle: Yes.

By Mr. Narelle:

Q. Mr. Coykendall, on these so-called seasonal contracts under which you guaranteee to perform this towing service as to schedules and as to rates, is there any obligation on the part of that boat owner to guarantee you a minimum amount of business per annum?

A. No—that is just for whatever business he may have.

Q. I see. Well, then, you would not consider that type of contract a bilateral contract?

A. Just what——

Q. Where there are obligations on both sides—for you to perform, and for him to guarantee you a minimum amount of towing per annum.

A. No minimum. He might, for instance, name his barges in the contract, and we are to have the towing of these barges if they run. If they don't, we don't get any towing.

Q. In other words, you would not consider that type of contract a bilateral contract?

A. No, I would not.

[fol. 161] Mr. Narelle: That is all.

Exam. Wilkins: This exhibit—a copy of a representative contract—will be marked Exhibit No. 1 and received in evidence.

(Applicant's Exhibit 1, Witness Coykendall, received in evidence.)

Exam. Wilkins: If there is nothing further, the witness is excused.

(Witness excused.)

(Discussion off the record.)

Mr. Erskine: I rest.

Exam. Wilkins: The Examiner understands that this is all that is to be presented in favor of the applicant. Will there be some witnesses on behalf of intervenors? I understand that one intervenor is in opposition, and one has not as yet stated his position. Do you have any witnesses that you want to present for this hearing before this matter is closed?

Mr. Narelle: No. What is the procedure here, Mr. Examiner, on the question of filing briefs.

Exam. Wilkins: That is what the Examiner is coming to now, if there are no further witnesses.

Mr. Narelle: No further witnesses.

Exam. Wilkins: Do the parties desire to file briefs?

Mr. Erskine: Yes.

[fol. 162] Exam. Wilkins: Then I will fix the date for filing of briefs as November 3; that is 30 days from now. If there is nothing further, the hearing is closed.

(Whereupon the hearing was closed at 11 o'clock a. m.)

[fol. 163] APPLICANT'S EXHIBIT E, WITNESS COYKENDALL

Agreement, made this — day of ——, between Blank Company of (Place), party of the first part, and the Cornell Steamboat Company, a corporation of New York, party of the second part.

Witnesseth, That for the considerations and conditions hereinafter contained, and for the sum of One ($1.00) dollar, each to the other paid, the receipt of which is hereby acknowledged, the parties hereto agree as follows:

1. The party of the first part agrees to employ the party of the second part, to tow all barges, scows or other vessels which are engaged in carrying brick from the docks of the party of the first part situated at (Place) to destinations on the Hudson River and in New York Harbor, and to pay for such service at the charges named herein.

2. The party of the second part, during the term of this contract, or any extension thereof, as herein provided, agrees to maintain and conduct a regular towing service to all points on the Hudson River and in New York Harbor, during the season of open navigation in each year, and to tow barges to destinations ordered by the party of the first part, at the charges named therein.

3. The charges for round trip towing between (Place) [fol. 164] and the terminal at 52nd Street, North River, or such other terminal north of 52nd Street, as may be used shall be fixed charges per barge based upon —— per M, upon the full capacity of the barge figured to the next even $5.00 and based upon the new size of Hudson River brick as generally manufactured at the present time, which charge shall cover towing of the barge without cargo from the terminal stakeboat of the party of the second part at New York to the dock of the party of the first part at (Place), and return of the barge with cargo to a terminal at New York. To intermediate points on the Hudson River, the charge shall not be greater than made by the party of the second part to any other brick customer for like service. The destinations covered by the preceding shall be docks on the main channel of the Hudson River only. To docks not on the main channel, where creek or high water towing is required, the customary extra charges of the party of the second part shall be paid by the party of the first part. It is understood that the towing charges named herein are

based upon towing the barges in accordance with the practice of the party of the second part in fleet tows with other barges and that the party of the second part is not liable for wharfage or other charges which may be made against [fol. 165] any barge at the New York Terminal or any destination.

4. The barges now owned by the party of the first part are agreed to be of the capacities stated in the following schedule and shall be charged at the fixed prices named for towing from (Place) to New York and return:

Barge	Capacity	Price
A 1	370 M	—
A 2	350 M	—

Barges will be considered to carry full loads unless the cargoes are ten (10%) per cent or more below capacity in which case an allowance will be made.

5. For delivery from the terminal at 52nd Street, North River to points in New York Harbor, the charges shall be according to the following schedule. If it is necessary to use another terminal north of 52nd Street, North River, then the charges for Harbor delivery may be readjusted accordingly provided that in any case where the party of the second part shall be entitled to make readjusted charges, or to receive additional compensation, as in the paragraph provided, such charges or compensation shall be at no higher rate than charged to any other person or corporation, by the party of the second part, for brick barge towing.

(Schedule)

6. In any event, and particularly with respect to any round trip towage of the barges, scows or other vessels referred to herein, the party of the second part shall not be [fol. 166] deemed to have the said barges, scows or other vessels in its custody and shall not be under any responsibility to the same while the said barges, scows or other vessels are lying at any dock or terminal, and are not actually being towed by the tugs of the party of the second part.

7. This contract is to take effect on the — day of —— and is to continue in force until the — day of ——. The contract shall further continue in force after —— unless

before —— either party shall specify in writing its desire to terminate the contract and if such notice be given then the contract shall terminate on the ——, but if such notice be not given, then the contract shall continue from year to year and thereafter may not be terminated except upon twelve months written notice by either party.

8. Bills are to be rendered monthly and are to be paid by the party of the first part on or before the twentieth day of the month following that in which the work is done.

9. Towing of barges owned or chartered by the party of the first part and loaded with material other than brick, or other towing of barges owned or chartered by the party of the first part, not covered by the schedules named herein, shall be included in this contract and paid for by the party [fol. 167] of the first part at the current charges of the party of the second part to other customers for similar service.

10. If, during the life of this contract, the party of the second part shall make any general reduction in its charges to other brick customers for similar service, then the charges named herein shall be reduced so as not to be in excess of similar charges to others.

11. If, during the life of this contract, due to strikes or other causes beyond the control of the party of the second part, the cost of fuel or labor shall be increased to the party of the second part, then the charges named herein may be increased, providing such increase is effective as to all other parties for whom the party of the second part shall render similar service for barges.

12. This contract shall be binding upon both parties, their successors or their assigns.

In testimony whereof, the parties hereto have set their hands this — day of ——, in the year ——.

—— ——.

[fols. 168-178] Proposed report omitted. Printed side page 23 ante.

[fol. 179] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. W-359

PETITION of CORNELL STEAMBOAT COMPANY for an Order Dismissing Its Application for a Permit under Section 309(f) of the Transportation Act of 1940.

EXCEPTIONS OF CORNELL STEAMBOAT COMPANY TO PROPOSED REPORT, BRIEF IN SUPPORT OF EXCEPTIONS (BY REFERENCE TO THE PRINTED BRIEF HERETOFORE FILED HEREIN), AND REQUEST FOR ORAL ARGUMENT—Filed February 2, 1942

I

Exceptions

Your petitioner, Cornell Steamboat Company, respectfully excepts to the report proposed herein by Andrew C. Wilkins, Examiner, in the following respects:

1. The undisputed facts found by the Examiner in his proposed report (Sheets 1-6) establish that both in fact and in law your petitioner engages solely in the business of furnishing towage services for hire, does not carry nor contract to carry any merchandise or passengers, and does not engage in the business of a contract carrier. That appears more particularly from the following findings of the Examiner:

> [fol. 180] "• • • but applicant does not own or operate any barges or lighters or similar type of *carrying craft.* No cargoes of merchandise for hire or passengers are carried on any of the towboats, and they are used exclusively in towing for applicant's customers, over 70 per cent of whom are shippers who own or operate the scows or barges used *in carrying their own merchandise.* Other customers *are water carriers.*" (Italics ours. Report, Sheets 2-3.)
>
> "The only interest applicant has in a cargo is its weight and the size of the scow or barge on which it is loaded. The rate charged for towing is lower for the larger units." (Report, Sheet 3.)
>
> "Applicant does not issue any bill of lading or similar document with respect to the cargoes on the scows or barges towed. Each scow or barge has its own

captain who looks after the safety of the vessel and its cargo. Neither the captain of the towboat nor any other employee of applicant has anything to do with the cargoes on the vessels in the tow. Applicant generally has no interest in or knowledge of the origin or final destination of the cargoes. * * *" (Sheet 4.)

Those are plain findings that your petitioner does not enter into any contract for the carriage of merchandise or passengers, does not in fact carry any, and that the carriage is actually performed by petitioner's customers who own or operate the scows and barges on which the merchandise is carried. Therefore, the proposed report errs in recommending the conclusion that your petitioner is a contract carrier by water, and was such on January 1st, 1940. (Report, Sheets 8-9.)

2. The proposed report erroneously ignores the fact that the words "carriage" and "transportation" are synon- [fol. 181] ymous, both in their plain and every-day usage, and in their usage by Congress in the provisions of the Transportation Act of 1940 (Report, Sheets 8-10). By reason thereof, the report ignores the plain intent of Congress to regulate only carriers within the plain and common meaning of the word,—*i.e.*, those who engage in the business of carrying merchandise or passengers under the contractual obligations of carriers. On the facts found by the Examiner, your petitioner does not come within that category.

3. In spite of the proofs that your petitioner is not a carrier, the proposed report recommends that it be held to be a contract carrier by reason of the definitions of "transportation facility" and "transportation", as set forth in Section 302(g) and (h), as applied to the towing services of the petitioner and the use of its tugboats (Report, Sheet 8). That recommendation is not supported by any reasonable interpretation of the provisions of Part III of the Act, which indicate plainly that Congress intended to regulate only those persons who are engaged in the business of carriers, within the ordinary meaning of the word. Section 302(e) provides as follows:

"(e) The term 'contract carrier by water' means any person which, under individual contracts, or agree-

ments, engages in the transportation * * * by water, of passengers or property in interstate or foreign commerce for compensation."

Therefore, the subsequent definitions in Section 302(g) and (h) must have been intended by Congress to relate to services and equipment furnished or used *by persons who are in fact carriers.* Those are the only persons with whom Congress was concerned. It is an improper distortion of the plain meaning of the provisions of the Act as a whole to [fol. 182] suggest that Congress in the definitions contained in Sections 302(g) and (h) inten-ed by legislative fiat to make any party a carrier who in actual fact is not a carrier.

4. The recommendation that the Commission should find that your petitioner is entitled to a permit as a contract carrier under the provisions of Section 309(f)(g) and that such a permit should be issued, (Report, Sheets 8-10), is in violation of the plain language of those provisions which do not confer any such authority upon the Commission. Section 309(f)(g) expressly provides that the only person required to hold such a permit *and the only person to whom the Commission has authority to issue* such a permit is one who "shall engage in the business of a contract carrier by water." On the undisputed facts found by the Examiner your petitioner does not come within that category.

5. The proposed report is in error in recommending that the Commission should conclude that the provisions of Section 303(f)(2) were not intended by Congress to indicate that persons who are not carriers and who merely furnish towage services for hire are not subject to the provisions of Part III of the said act. (Report, Sheet 8.)

6. The proposed report is in error in recommending a conclusion that the towage services rendered by your petitioner to carriers are transportation services (Report, Sheet 8). Such a recommendation ignores the synonymous character of the words "transportation" and "carrriage", and ignores the undisputed fact that the actual carriage is performed by the owners or operators of the scows and barges, and not by your petitioner. Congress plainly intended the Act to apply only to carriers.

[fol. 183] 7. The proposed report errs in recommending that the Commission find that towage services rendered by

the petitioner intra-state are not incidental to the interstate carriage of merchandise by the carriers themselves (Report, Sheets 8-9.)

8. The proposed report errs in recommending that the Commission find that towage services performed by your petitioner for carriers from or to points outside the limits of New York Harbor are not incidental to the transportation performed by the carriers themselves, and are not exempt from the Act under the provisions of Section 303(f)(2) (Report, Sheets 8-9.)

9. The proposed report errs in failing to recommend to the Commission the conclusions that your petitioner is not a carrier, is not engaged in the business of a contract carrier by water, and is not subject to Part III of the Transportation Act of 1940, and that the Commission is not authorized to require that your petitioner hold, or to issue to your petitioner, a permit under Section 309(f).

10. The proposed report errs in failing to recommend that the Commission grant the petition herein and dismiss the application for a permit on the ground that your petitioner is not subject to the Act.

II

Brief in Support of Exceptions

Your petitioner respectfully requests that the printed brief which it filed with the Commisison in this matter on November 4th, 1941, be received and considered by the Commission as its brief in support of the foregoing exceptions.

[fol. 184]

III

Request for Oral Argument

Your petitioner respectfully requests that an oral argument of the questions involved herein be granted. The questions are of importance not only to your petitioner but also to all other parties who, like your petitioner, merely furnish towage services for hire, and do not carry any merchandise or passengers, and are not carriers by water. So far as your petitioner is aware, these questions have not yet received the final consideration and determination of the

Commission, in its interpretation of the provisions of Part III of the Transportation Act of 1940. Oral argument has the possibility of contributing effectively to an intelligent determination of those questions, and your petitioner believes that the importance of the matter requires that oral argument should be granted.

January 31st, 1942.

Respectfully submitted, Robert S. Erskine, Attorney for Cornell Steamboat Company, Office and P. O. Address, 120 Broadway, Borough of Manhattan, City of New York.

[fol. 185] CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing exceptions and request for oral argument upon all parties of record by mailing a copy thereof, properly addressed, to each party; and also that the brief for the petitioner, submitted herein by reference, was heretofore served upon all parties of record on November 1st, 1941.

Dated New York, N. Y., January 31st, 1942.

(Signed) Robert S. Erskine.

[fols. 186-200] Opinion, certificate and order omitted. Printed side page 32 ante.

[fol. 201] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. W-359

In the Matter of the Application of CORNELL STEAMBOAT COMPANY for a Permit as a Contract Carrier by Water

PETITION FOR REARGUMENT AND REHEARING—Filed July 8, 1942

Now Comes Cornell Steamboat Company and respectfully petitions that the Commission will grant a reargument and rehearing of the report and order filed and entered herein by Division 4 of the Commission on June 15th, 1942; that the said reargument and rehearing may be before the full Commission; and that the Commission will stay the afore-

said order of Division 4 pending the final determination of the said reargument and rehearing.

[fol. 202] STATEMENT

Cornell Steamboat Company, (hereinafter referred to as Petitioner), a New York corporation, is engaged solely in the business of performing towage services under contract. As more fully appears from the facts found and set forth in the report of Division 4 herein, Petitioner does not carry any passengers or merchandise upon its tugboats, which are used exclusively in performing contract towing services for its customers on the Hudson River between Waterford, N. Y., and New York City, and in the waters adjacent to New York City. Petitioner's customers are owners or operators of barges and scows, or similar vessels, on which the said customers are, themselves, the carriers of merchandise and cargoes. Petitioner has no contractual relationship with the cargoes which are carried by its customers, issues no bills of lading or other similar documents, has no interest whatsoever in the said cargoes or their freight moneys, and, under the heretofore established law, is under no liability except for negligent towage.

Petitioner, under the Transportation Act of 1940, filed [fol. 203] with the Commission an application for a permit as a contract carrier, without prejudice to its contention that it is not in fact or in law a carrier, and, therefore, is not subject to Part III of the said Act. Contemporaneously, Petitioner filed its petition for a dismissal of its application upon the aforesaid grounds. That procedure was adopted in accordance with a suggestion of the Director of the Bureau of Water Carriers, in order to determine the question of the application of the Act to an independent contract tower such as Petitioner.

Division 4, in its report and order filed and entered by it on June 15th, 1942, has now held that, under the provisions of Part III of the Transportation Act of 1940, Petitioner is engaged in the business of a common carrier, has issued a certificate to it as such, has denied the petition to dismiss the application for a permit, and has ordered that Petitioner perform its contract towage services as a certificated common carrier from and after July 24th, 1942.

Petitioner respectfully submits that there is error in the report and order of Division 4 in the following respects, [fol. 204] among others:

Exceptions

1. The undisputed facts, as found by Division 4, establish that Petitioner is not a carrier and that it does not engage in the business of a carrier by the performances of its contracts for towage services under the legal and common and legislative meaning of the word "carrier", as heretofore established by the courts of the United States.

2. There is no language in the Transportation Act of 1940, Part III, to indicate that Congress used the words "carrier" or "the business of a carrier" in any other than their common meaning, as used in earlier legislation relating to water carriers, and as established by the courts of the United States. It is well-settled that an independent contract tower and its business do not come within the common meaning of those words.

[fol. 205] 3. Division 4 has erred by inferring that Congress intended to regulate the use of vessels *per se*. The wording of the Act shows the plain intent of Congress to regulate only *persons engaged in the business of carriers*. It is elementary that such a business involves a contractual relationship between the carrier and the merchandise carried. There is no such relationship in the business of an independent contract tower. In fact, Petitioner has no part or voice in the contracts of carriage entered into between the owners of the barges and scows and the owners of the cargoes.

4. Under the established law of the land, including the judicial interpretation of the word "carrier" as used in earlier legislation relating to water carriers, an independent tower performing services such as those of Petitioner is not a carrier either in fact or in law. Therefore, if Division 4, (on sheet 7 of its report), intended to find that under § 320 (d) there is no conflict between the aforesaid law and the provisions of the Act, Division 4 has erred in concluding that the Act was intended to convert an independent [fol. 206] tower into a common carrier. Conversely, the present holding by Division 4, that under the Act Petitioner is engaging in the business of a common carrier, would involve a direct conflict between the provisions of the Act and the previously existing law, and would assume an intent of Congress (not indicated in the Act itself), to

make a revolutionary change in the law applicable to the status and business of an independent tower.

5. By reason of the matters set forth in the preceding paragraph, Division 4 has erred in its conclusion that Petitioner can at the same time be held to be engaging in the business of a common carrier under the Act, and yet be under none of the legal liabilities of such a common carrier, because of § 320(d).

6. Even if Petitioner is engaged in business as a carrier (which Petitioner disputes), Division 4 has erred in holding that Petitioner has held itself out as a common carrier. The undisputed facts show that Petitioner has held itself [fol. 207] out only to tow for those persons with whom it may be willing to contract and only upon terms and conditions quite different from those of a common carrier. The facts that Petitioner has performed its contract services for many years, is widely known, and has a large list of customers, do not constitute a "holding out" as a common carrier.

7. Division 4 has erred in finding that the towage operations of Petitioner on the Federal waterway of the Hudson River between Waterford, N. Y., and New York City are interstate in character, merely because its tows may cross the imaginary boundary line of the State of New Jersey at some point in the Hudson River. *People Ex Rel. Cornell v. Sohmer* (1914) 235 U. S. 549, 560-561. Division 4 erred in failing to find that such towage services are intra-state in fact and in law.

8. Division 4 has apparently been influenced in its conclusions by its belief that independent towers, like Petitioner, must be subjected to regulation in order to carry out the broad purposes of the Act. (*Report*, Sheets 8-9). There is no sound basis for any such Conclusion. Congress [fol. 208] plainly provided that the purposes of the Act be achieved through the regulation of the carriers themselves, —i. e., the owners and operators of the barges and scows, who undertake to carry, and actually carry the merchandise. To those carriers, the towage charges of an independent tower, such as Petitioner, are merely an incidental operating expense, just as are the items of wharfage, insurance, wages, repairs, etc. The purposes of the Act can be completely achieved by the regulation of the said carriers, and

there is, therefore, no reason to assume that Congress intended the Commission to make a revolutionary change in the law applicable to the status and business of independent towers in order to regulate the carriers.

9. Division 4, on the established facts and law, has erred in its refusal to dismiss Petitioner's application for a permit on the ground that Petitioner is not engaged in business as a carrier, and therefore is not subject to the Act.

10. Alternatively, if Petitioner be held to engage in the business of a carrer (which Petitioner disputes), Division 4 [fol. 209] has erred in failing to find that Petitioner has only the status of a contract carrier, and should receive a permit to continue its operations as such.

Reasons for Granting the Reargument and Rehearing

Petitioner, and other independent towers, of which there are many, are vitally and seriously affected by the revolutionary change in their status and legal liability which would result under the report and other of Division 4.

Such independent towers have been engaged in the business of contract towing for many years under a status of legal liability which has been well defined by the courts. They have developed their extensive business of contract towing in the knowledge that, under well-settled law, they are not common carriers, and are not "carriers" of any sort, but are liable only in *tort* to the boats in their tows or to the cargoes on those boats, for the consequences of negligence in the performance of their towage services. On [fol. 210] such basis, they have been under none of the liabilities of a common carrier, and have been free to enter into contracts of towage upon special terms and conditions, (such as freedom from liability for negligence,) which would not be available to a common carrier. As contract towers they have been free to base their towing charges upon the circumstances and conditions peculiar to the towage services to be rendered under any individual contract. They have been under no contractual obligations to the cargoes loaded upon the barges and scows owned and operated by the carriers themselves, (Petitioner's customers), and have not been obligated in law to issue any bills of lading or similar documents to the said cargoes. They have been under no responsibilities or liabilities beyond the proper performance of their towage serv-

ices between the points of starting and ending the towage services, irrespective of any prior or subsequent movements of the barges and scows and their cargoes by other sources.

It is at once apparent that if such independent towers as Petitioner are now held and certificated to be engaged in [fol. 211] the business of common carriers, the effect upon the status and business of such towers will be revolutionary. They will come before the courts as persons engaged in the business of common carriers, presumably with all the liabilities of common carriers; and the rights and immunities which they have heretofore had as towers will be completely nullified.

Petitioner submits, therefore, that the questions involved in this proceeding are of such paramount importance that they should receive the most careful consideration and final determination of the Commission.

Conclusion

Accordingly, Petitioner respectfully prays:

1. That the Commission will grant this petition and will direct that there be had, before the full Commission, a reargument and rehearing of the report and order filed and entered herein by Division 4 on June 15th, 1942;

[fol. 212] 2. That the Commission will stay the aforesaid order of Division 4, pending the final determination of the said reargument and rehearing.

3. That the Commission, after rehearing and reargument, and after such further consideration of the matter as it may deem proper, will be pleased to reverse the aforesaid report and order of Division 4, and will direct the dismissal of your Petitioner's application for a permit on the ground that it is not a carrier and is not subject to the terms of Part III of the Transportation Act of 1940;

4. Alternatively, that the Commission, if it finds that Petitioner is a carrier, (which Petitioner disputes,) will modify the aforesaid report and order of Division 4 by finding that Petitioner is only a contract carrier, and will direct the issuance of a permit to it to operate as such;

5. That the Commission will be pleased to find and direct that Petitioner's performance of towage services upon the

Hudson River between points in New York State and New [fol. 213] York City are not of such interstate character as to bring them under the regulations of the aforesaid Act of 1940.

6. That the Commission will grant such other and further relief to Petitioner as may seem just in the premises.

Respectfully submitted, Cornell Steamboat Company By (Signed) Robert S. Erskine, Attorney for Petitioner Office & P. O. Address 120 Broadway, Borough of Manhattan City of New York.

Dated New York, the 7th day of July, 1942.

Certificate of Service

I hereby certify that I have this day served the foregoing petition upon all the parties in this proceeding by mailing a copy thereof to each of the said parties.

(Signed) Robert S. Erskine, Attorney for Petitioner.

Dated, New York, the 7th day of July, 1942.

[fols. 214-224] Report on reargument omitted. Printed side page 56, ante.

[fol. 225] In United States District Court

Cornell Steamboat Company, Plaintiff,

v.

United States of America, Defendant

Opinion—Filed July 9, 1943

Before Frank, Circuit Judge, and Coxe and Bright, District Judges

Kirlin, Campbell, Hickox, Keating & McGrann, (Robert S. Erskine, of Counsel), for plaintiff,

Robert L. Pierce, Special Assistant to the Attorney General, for the United States,

E. M. Reidy, Assistant Chief Counsel, for the Interstate Commerce Commission,

Tom C. Clark, Assistant Attorney General (Daniel W. Knowlton, of counsel) for defendant,

Foley & Martin (James A. Martin and Christopher E. Heckman, of counsel) for National Water Carriers Association, Inc., Intervenors,

Bingham, Dana & Gould (Boston, Mass.) for Boston Tow Boat Company, Intervenors.

Suit by plaintiff against the Interstate Commerce Commission, complaining of an order entered by the Commission pursuant to Part III of the Interstate Commerce Act. Dismissed.

The plaintiff, Cornell Steamboat Company, a New York corporation, filed an application with the Interstate Commerce Commission for a permit as a "contract carrier by water" under Part III of the Interstate Commerce Act, to continue its operation under the so-called "grandfather" clause of that Act as a "contract carrier"; that clause [fol. 226] (§309) provides for the issuance, without proof that the public convenience and necessity will be served thereby, of a certificate to a carrier engaged in bona fide operations on January 1, 1940 and continually since then, either as a "contract carrier" or a "common carrier." In the alternative, plaintiff asked that its application be considered one for the appropriate form of authority. In its application plaintiff also stated that it was filing the same without prejudice to its contention that it was not a carrier and that it was not subject to the jurisdiction of the Commission; at the same time, plaintiff filed with the Commission a petition to dismiss its application on the same grounds. Evidence was taken before a Commission Examiner who made a proposed report to the effect that plaintiff was a "grandfather" contract carrier. Exceptions to this report were argued before Division 4 of the Commission which held that the plaintiff was "a common carrier by water," entitled to a "grandfather" certificate as such and that such a certificate should issue. On plaintiff's motion, the matter was re-argued before the full Commission which, with a slight modification,[1] affirmed the opinion and findings of Division 4 and entered an order accordingly.

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[1] The modification, pursuant to §303(g), provided that no certificate was required for towage performed by plaintiff wholly within New York Harbor, since plaintiff is not, as to such towage, a party to any arrangement for the through carriage of the barges towed or their cargoes to points outside New York State.

The evidence before the Commission showed the following: The plaintiff for many years before and on January 1, 1940, and continuously since then, owned tugboats which it used to furnish towage services for hire on the Hudson River between Waterford, New York, and New York City, New York, and upon the waters of New York Harbor or the waters surrounding New York City.[1a] At the time of [fol. 227] the hearing, plaintiff owned thirty-three tugs. It furnishes its services to barges, scows and similar vessels which themselves usually carry cargoes. Plaintiff does not carry any freight or passengers on its tugs. The tugs merely attach their towing lines to the vessels to be towed and move them to points of destination as directed by the owners or operators of those vessels. Each of those vessels thus towed has its own captain on board; plaintiff's employees have nothing to do with the carrying of any cargo on those vessels. Plaintiff issues no bills of lading or similar documents for any such cargoes, and has no arrangement with anybody except the owners or operators of such vessels.[1b] Over 70% of plaintiff's customers are shippers

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[1a] Plaintiff was incorporated in 1878 to continue the towing business started in 1837 by the grandfather of its president who has held that position for the past 29 years. From its inception, the business of plaintiff has been, and still is, owned by succeeding generations of the same family.

[1b] It has no direct or indirect interest in, and often has no knowledge of, the character of those cargoes, or of the origin or final destination thereof. Its responsibilities begin when the vessel is taken in tow and ends when the tow is left at the agreed destination. It has nothing to do with the contractual arrangements between the barge-owners and the cargo-owners as to any forwarding or delivery of the cargo. It takes no part in, and has no interest whatever in, and no knowledge of, the arrangements between the owners of the cargoes and the barge-owners either with respect to freight-rates or with respect to any other terms of their contract to carry. Plaintiff's charges are agreed on in its contracts with the owners or operators of the towed vessels, are not dependent in any way upon the freight monies between those vessels and their cargoes, are direct charges against the barge-owners under its contracts with them, and are secured by maritime liens against

who own or operate towed barges used in carrying their own merchandise. The largest part of its business is done on time contracts entered into for a period of years; some contracts run for a single year; from 12% to 13% of its business is done under miscellaneous contracts arranged from day to day. Arrangements for all its towing services are based on separate agreements.

While approximately 95% of its services consist of towing from points of departure in New York State to points of destination in the same State, most of its tows cross into New Jersey waters, as the New York-New Jersey [fol. 228] boundary follows the middle of the river and, because the navigable channel of the river for some seven or eight miles lies west of the boundary line. A small amount, less than 5%, of plaintiff's towing service is rendered between points in New Jersey adjacent to the Hudson River or New York Harbor and points outside the harbor in New York State.

The Commission held that plaintiff was engaged in interstate commerce as "a common carrier by water by towing vessels in the performance of towage of non-self-propelled freight-carrying vessels between points within New York Harbor, New York, and New Jersey, and Waterford, New York * * * and intermediate points on the Hudson River." In making its finding that the plaintiff, pursuant to the Act, is a common carrier, because it held itself out

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the vessels towed and not against their cargoes. The agreed towage charges depend upon the size of the vessel towed and her carrying capacity, but the volume, character or weight of the cargo is of no other concern to plaintiff. The rate is lower if the barge is towed with others in a flotilla which plaintiff schedules for its customers to leave New York Harbor on certain days of the week or to leave Albany, New York, or some other point on the Hudson, on certain other days of the week. The regular service is maintained under contracts to meet the needs of certain customers. Other customers who can wait for their service until the regular flotilla is towed are given the benefit of the lower unit cost. If a customer desires individual service on a certain date, the rate is higher.

as such, the Commission referred in particular to the testimony of plaintiff's president set forth in the footnote.[1c] [fol. 229] Plaintiff began this suit, pursuant to 28 U. S. C. A. §§ 41(27-28) and 43-48, praying that the Commission

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[1c] "Q. Within the range of your operation, with credit considerations being favorable, contents of the barges being what you think they should be, will you tow for anyone seeking your services? A. We are like to, yes • • • We don't hold ourselves out at all. As a rule, we do take orders, as I mentioned. I think that 12 or 13 percent of our business is miscellaneous business. People will call up today and say that they want us to take a barge from here to there. We ask what kind of barge it is and how much it carries, and we give them a price, and we do that job. The rest is all by yearly or regular arrangements with customers, even down to the naming of the barge that they want towed • • • We have some on the blacklist, whom we do not tow, because we know that they don't pay • • •

"Q. But if there is some boat-owner who may not have a yearly contract with you—and provided that the vessel and the cargo and the credit arrangement are satisfactory—you will tow his boat in that fleet? A. Surely—if he gives us an order for it before the tow starts."

The Commission also pointed out that that same witness "testified that in the tows that leave New York nightly for up-river points, 'we have practically no limits; we take all that will come'; and explained that by 'all that will come' he meant, 'individual customers or people who have made arrangements with us. • • • We must have the order for the barge before the barges leave the stake boat.' He further testified that arrangements for a particular towing job could be entered into over the telephone, and upon inquiry whether such an arrangement would be entered into with persons with whom he had had no prior dealings, replied: 'We would want to know something about them. If it was out of the blue, we would want to know who he was, and what he had to go, before we would give him a price.' Sometimes prepayment of charges has been required. As to the breadth of applicant's willingness to transport: Witness testified that 'Having been there since 1837, we pretty much know every manufacturer on the river. We go to him and ask him for a contact, and show him what kind

be ordered to grant plaintiff's petition to dismiss its application or, in the alternative, that this court direct the Commission to issue to plaintiff a certificate as a contract carrier.[14] The evidence presented at the hearing before this court consisted solely of the petitions filed before, the testimony presented to, and the opinion, findings and orders of, the Commission.

[fol. 230] FRANK, Circuit Judge:

1. Plaintiff contends that, as a tower, it is not a "carrier by water" within the meaning of the Act. We cannot agree. Plaintiff literally "engages in the transportation by water of * * * property * * * for compensation," which is the test under § 302 (c) and (d). For the dictionary tells

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of service we can give, and he gives us the contract.' And again, respecting the daily towing schedules: 'The business has been going on for so long that everybody knows it.'"

Division 4 noted the testimony that plaintiff sometimes refused requests for services when they could not be rendered without injuring one of the regular customers, saying, "How such injury could result is not explained, and, in view of the evidence that there is practically no limit to the number of barges it can include in a flotilla, the statement is unintelligible." The Commission regarded as immaterial the fact that plaintiff frequently had declined to perform towage unless it was given a release from all liability, including liability for negligence."

The Commission stated: "We find that the evidence discloses the fact of a general holding out tempered by prudence, a desire for business rather than a desire to exclude any. We find as a fact that applicant holds itself out to the public to tow for anyone with ability and willingness to pay for the service. Such a holding out, accompanied by performance, constitutes one a common carrier."

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[14] National Water Carriers Association, Inc., and The Boston Towing Company, having been permitted to intervene in the Commission's proceedings, sought intervention in this suit. Objections to these interventions were made but were later withdrawn and the interventions were accordingly permitted.

us that, nautically, to transport is "to haul a vessel by hawsers." And a barge is both a "vessel" and "property." Section 302(h) states that transportation "includes the use of any transportation facility" and § 302(g) includes, in the term "transportation facility," "any vessel," while "vessel," in turn, is defined in §302(f) to mean "any watercraft."[1a] Plaintiff, however, argues that § 302(g) also defines "transportation facility" to include "any * * * wharf," and yet the Commission has held that wharfingers are not within the Act;[2] but the Commission so held because the legislative history showed a clear Congressional intent to exclude wharfingers. Finally, and most important, § 303(f)(2) which expressly excludes certain kinds of towage would be meaningless if towage generally were not included; and plaintiff's activities are not within the excluded varieties of towage.

2. Plaintiff argues that even if it be a "carrier by water" within the meaning of the Act, it is not a "common carrier by water." Plaintiff points to decisions in which, before the passage of this Act, persons engaged in activities such as that in which it engages were held not to be common carriers. It is suggested that, accordingly, the constitutional power of Congress to regulate plaintiff as a common carrier is doubtful and that a statute should be so construed as to avoid raising grave doubts as to its constitutionality. But, since *Nebbia* v. *New York*, 291 U. S. 502 and *Olsen* v. [fol. 231] *Nebraska*, 313 U. S. 236, there have been no such doubts; for it is now well settled that "there is no closed class or category * * * of businesses affected with a public interest." There is no need to repeat here what was said in *Fordham Bus Corporation* v. *U. S.*, 41 Fed. Supp. 712, 715, where this very question was fully discussed with reference to the regulation of motor carriers under Part II of this Act.[3]

[1a] Cf. *Union Stockyard & Transit Co.* v. *U. S.*, 308 U. S. 213, 217.

[2] *Status of Wharfingers*, 215 I. C. C. 633.

[3] Cf. *Alton R. Co.* v. *U. S.*, 315 U. S. 15, 23 which indicated that one who was a "contract carrier" under a state permit can claim "grandfather" rights as a common carrier under Part II of this Act.

We fail to understand plaintiff's contention that, because it was not a common carrier for purposes of liability under the Harter Act or otherwise in Admiralty or at common law, this Act should be construed as not intended to include it as a common carrier; for in § 320(d) [4] Congress showed that it had in mind the difference between the question of liability and that of regulation. By labeling persons such as plaintiff "common carriers" in this Act, they do not become such for all purposes; this is made clear by § 302 which, in so labeling them, expressly states that it does so "for the purposes of this Act." And see *Stimson Lumber Co.* v. *Kuykendall*, 275 U. S. 199, 211-212; *United States* v. *Brooklyn Terminal*, 249 U. S. 296, 304; *Liverpool Steam Company* v. *Phenix Insurance Co.*, 129 U. S. 397, 440.

That plaintiff supplies merely the hauling power and has no contractual relations with those who ship their goods on the barges towed by plaintiff is irrelevant, as appears from decisions as to similar situations with respect to railroad carriers under Part I of this Act.[5]

[fol. 232] Plaintiff urges that Congress could not have intended it to be classified as a common carrier under the Act because it was not such before the passage of the Act and because the "grandfather" clause, § 309(a), provides that, if a carrier was in operation "as a common carrier by water" on a stated date before the Act was enacted, it is entitled to a "grandfather" certificate. But clearly what Congress meant was that a person is entitled to such a certificate if, on the specified date before the enactment of the legislature, it had been engaged in activities which,

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[4] §320(d) reads: "Nothing in this part shall be construed to affect any law of navigation, the Admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation or custom not in conflict with the provisions of this Part."

[5] *U. S.* v. *California*, 297 U. S. 175, 182-183; *Union Stock Yard & Transit Co.* v. *U. S.*, 208 U. S. 213, 219; *U. S.* v. *Brooklyn Terminal*, 249 U. S. 296, 305; *Belt Ry. Co.* v. *U. S.*, 168 F. 542, 544; *U. S.* v. *Sioux City Stockyard Co.*, 162 F. 556.

after the statute went into effect, would constitute it a common carrier.[6]

There is substantial evidence to sustain the Commission's finding that plaintiff so "holds itself out to the general public" [see § 302(d)] that it is a "common" and not a "contract carrier." The differentiation between a "common" and a "contract" carrier is well-explained by Judge McGuire in *Doyle Transfer Co.* v. *U. S.*, 45 Fed. Supp. 691[7]; that case, to be sure, related to Part II of the Act, but the definitions of "common" and "contract" carriers in Parts II and III are identical (excepting that in the latter "by water" appears in the place of "by motor vehicle.") See also *Fordham Bus Corporation* v. *U. S.*, 41 Fed. Supp. 712, 717-718.

It goes without saying that, since there is substantial evidence to support the Commission's finding, we must sustain it, whether or not we would have made that finding,[7a] and also that it is not our province to consider the wisdom of the legislation. On the basis of the finding, we hold that [fol. 233] the Commission's conclusion and order was not erroneous.

3. Plaintiff argues that, in any event, it is not engaged in transportation, under § 302(i)(I), "wholly by water from a place in a state to a place in another state." Literally, of course, it is, for it transports from a "place" in the waters of New York to a "place" in the waters of New Jersey.

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[6] Note that the "grandfather" clause of Part II, as to motor carriers, § 206(f), is identical in language with § 309(f) and see *Alton R. Co.* v. *U. S.*, 315 U. S. 15, 23; cf. *Fordham Bus Corp.* v. *U. S.*, 41 Fed. Supp. 712.

[7] See the legislative history and the Commission decisions there cited and quoted.

[7a] See, e. g., *Sperry Gyroscope Co., Inc.* v. *N. L. R. B.*, 129 F. (2d) 922, 924 (C. C. A. 2) and cases there cited in note 1. That there were dissenting opinions filed by some of the Commissioners is immaterial. Cf. *Virginian Ry.* v. *U. S.*, 272 U. S. 658, 674-675.

The language of Part I, § 1(I), as to railroads is virtually the same, i. e., "from one state * * * to any other state." That language was construed, many years before the enactment of Part III, to apply to continuous transportation beginning in a state, running through a second state, and returning to the first state. *Missouri Pacific R. R. Co.* v. *Stroud*, 267 U. S. 404; *United States* v. *D. L. & W. R. Co.*, 152 Fed. 269. It is true that this interpretation has been said (152 Fed. at 272) to be strengthened by the fact that § 1(2) in Part I provides that jurisdiction over railroads shall not apply "to transportation * * * wholly within one state." But § 303(h) in Part III similarly precludes jurisdiction, as to water carriers, over "intra-state transportation." As the Commission says, if the words "wholly within a state" in Part I fortify the conclusion that it has jurisdiction under Part I over transportation between points in a single state through another state, the language quoted above from § 303(h) fortifies a similar conclusion under Part III.

Plaintiff points to the fact that, in 1935, Congress, in §203(10), Part II, as to interstate motor carriers, conferred jurisdiction by expressly defining "interstate commerce" to mean "commerce between any place in a state and any *place in another state or between places in the same state through another state.*"[8] Plaintiff argues that the omission from the definition of "interstate transportation" in Part III of the words we have italicized in this provision in Part II conclusively shows that Congress did not intend to confer such jurisdiction as to water carriers. [fol. 234] Had Parts II and III been enacted at the same time, that argument would have been most persuasive; but Part III was enacted in 1940, five years after the enactment of Part II. Congress must be deemed to have known in 1940 that the courts had held that the language employed in Part I had precisely the meaning of the language employed in Part II. Congress then had a choice of two methods of expressing the same intention; therefore, no significance can be given to the fact that, when it enacted Part III in 1940, it selected the language which it

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[8] Italics added.

had used in Part I rather than the language which it had used in Part II.[9]

Plaintiff places much reliance on *Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549. There this very plaintiff was subject to a tax imposed by a statute of the State of New York, for the privilege of doing business as a corporation, equal to a percentage of the gross earnings on transportation originating and terminating in that State; the statute expressly provided that the tax would not apply to earnings derived from interstate business. The State assessed the tax on earnings from towage between New York ports which passed through New Jersey waters. Plaintiff in that case contended that such traffic was interstate and not constitutionally taxable by the State, but the Supreme Court held otherwise. There is substantially no difference between the way traffic is now handled by plaintiff and the way it was then handled as described in that opinion. Accordingly, plaintiff argues that it has been held that it is not engaged in interstate commerce, and is therefore not subject to the Commission's jurisdiction. In so far as [fol. 235] this is a contention that Congress lacks the power constitutionally to regulate plaintiff under the Commerce clause, the contention must fail. Criteria employed in determining whether a state may validly tax because of the Commerce clause are not applicable to a determination whether the federal government may validly regulate under that clause. The *Sohmer* case itself relies upon, and cites, *Lehigh Valley R. R.* v. *Pennsylvania*, 145 U. S. 192, and *Ewing* v. *City of Leavenworth*, 226 U. S. 464, where that distinction is clearly made. See also *Hawley* v. *Kansas City Southern Ry. Co.*, 187 U. S. 617, 621.

Plaintiff also suggests that the *Sohmer* decision is a finding of fact, conclusive for all purposes, that it is engaged in intrastate commerce. The answer is that the "finding" was there made with reference to the power of the State to tax. In the instant case, the Commission, after a hearing, has made an express finding that plaintiff

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[9] These comments also answer a possible suggestion based upon the definition of "interstate commerce," similar to that used in Part II, in §402(a)(6) of Part IV, that Part having been enacted in 1942, two years after the enactment of Part III.

is engaged in interstate transportation as that term is defined in Part III.[10]

Pursuant to F. R. C. P. 52, we are filing herewith our findings of fact and our separate conclusions of law; as provided in that Rule, we will entertain a motion by either party that we amend the findings or make additional findings.

Dismissed.

Jerone N. Frank, U. S. C. J.; Alfred C. Coxe, U. S. D. J.; John Bright, U. S. D. J.

[fol. 235a] [File endorsement omitted.]

[fol. 236] IN UNITED STATES DISTRICT COURT

CORNELL STEAMBOAT COMPANY, Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant

Findings of Fact and Conclusions of Law—Filed July 9, 1943

The following are our findings of fact and separate conclusions of law made pursuant to F. R. C. P. 52:

FINDINGS OF FACT

1. Plaintiff filed an application with the Interstate Commerce Commission asking for a certificate as a contract carrier by water under §309(f) of Part III of the Interstate Commerce Act or for such certificate as it might be entitled to procure, and, simultaneously, petitioned the Commission to dismiss its application for lack of jurisdiction over plaintiff. A hearing was duly held at which evidence

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[10] The Commission urged that we apply the doctrine of such cases as *Gray* v. *Powell*, 314 U. S. 402, 413, as to the weight to be given to administrative interpretations of the statute. We have found it unnecessary to do so. Cf. *Hartford Electric Light Company* v. *F. P. C.*, 131 F. (2d) 953, 966 (C. C. A. 2).

was taken before a Commission Examiner; on exception to the Examiner's proposed report, Division 4 of the Commission, after argument, made findings of fact and an order. On reargument before the full Commission, it approved the findings and order of Division 4 with a slight modification.

2. The Commission found that plaintiff had held itself out as a common carrier by water for compensation, as that term is defined in the Act, in the performance of towage of non-self-propelled vessels "between points within New York Harbor, New York, and New Jersey * * * and Waterford, New York, and intermediate points on the Hudson River," and that it had performed such services on January 1, 1940 and continuously since then.

3. There was substantial evidence before the Commission to sustain those findings.

4. The Commission denied plaintiff's motion to dismiss its application and ordered that a certificate of convenience [fol. 237] and necessity issue to plaintiff as a common carrier by water in accordance with those findings and pursuant to §309(a) of the Act.

5. The evidence presented to this court on the hearing of this case consisted solely of plaintiff's application and petition before the Commission; the evidence considered by the Commission; a proposed report made by a Commission Examiner who heard the evidence; the opinion, findings and order of Division 4 of the Commission; and the opinion, findings and order of the full Commission.

6. The undisputed evidence is that, while 95% of plaintiff's services have consisted of towing, through the Hudson River, from points of departure in New York State to points of destination in that State, yet most of its tows crossed into New Jersey waters for some seven or eight miles and were obliged to do so because, for that distance, the navigable channel of the Hudson River lies west of the New York-New Jersey boundary line; and that something less than 5% of plaintiff's business consisted of towing between points in New Jersey adjacent to the Hudson River or New York Harbor and points outside the harbor in New York State.

[fols. 238-239] CONCLUSIONS OF LAW

1. The findings of fact made by the Commission are not erroneous.

2. Within the meaning of Part III of the Act, plaintiff is engaged in transportation "wholly by water from a place in a state to a place in another state."

3. The order of the Commission is supported by its findings and is not erroneous.

4. The statute, so far as made applicable to the plaintiff by the order of the Commission, is not violative of any part of the Constitution of the United States.

Jerome N. Frank, U. S. C. J.; Alfred C. Coxe, U. S. D. J.; John Bright, U. S. D. J.

Dated: New York, N. Y. July 7, 1943.

[fol. 240] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil No. 21-35

CORNELL STEAMBOAT COMPANY, Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant,

and

INTERSTATE COMMERCE COMMISSION, Intervening Defendant,

and

BOSTON TOWBOAT COMPANY, Intervening Plaintiff,

and

NATIONAL WATER CARRIERS ASSOCIATION, INC., Intervening Defendant

FINAL DECREE AND JUDGMENT—July 30, 1943

The above entitled case having come on for final hearing on June 22, 1943, before a specially constituted district court of three judges, as required by the Urgent Deficiencies Act of October 22, 1913; and the court having considered the written and oral argument of counsel and the

evidence introduced; and the court having heretofore entered findings of fact, conclusions of law, and a written opinion dismissing the petition; it is

Ordered, Adjudged, and Decreed, this 30th day of July, [fol. 241] 1943, that the petition be and the same is hereby dismissed, with costs waived.

Jerome N. Frank, United States Circuit Judge. Alfred C. Coxe, United States District Judge. John Bright, United States District Judge.

July 30th, 1943.

[fol. 242] In the District Court of the United States

[Title omitted]

Stipulation Agreeing as to Form of Final Decree and Judgment—July 29, 1943

It is hereby stipulated by and between the parties to the above-styled cause that the attached Final Decree and Judgment is agreed to as to form and that the defendants shall waive their costs in said proceeding.

This 29 day of July, 1943.

Kirlin Campbell Hickox Keating & McGrann, Counsel for Plaintiff. E. M. Reidy, per R. L. P., Counsel for Intervening Defendant, Interstate Commerce Commission. Robert L. Pierce, Counsel for the United States. Bingham, Dana & Gould, Counsel for Intervening Plaintiff, Boston Towboat Company. Foley & Martin, Counsel for Intervening Defendant, National Water Carriers Asso., Inc.

[File endorsement omitted.]

[fol. 243] In the District Court of the United States

[Title omitted]

Order Allowing Appeal of Cornell Steamboat Co.—Aug. 10, 1943

The petition of Cornell Steamboat Company, plaintiff, for an appeal to the United States Supreme Court from the final decree and judgment entered herein on August 2, 1943

having been presented, together with its assignment of errors and statement as to jurisdiction, in accordance with Rule 12 of the Rules of the United States Supreme Court, it is

Ordered that an appeal be and is hereby allowed to the Supreme of the United States by Cornell Steamboat Company, plaintiff, from the final decree and judgment entered [fol. 244] herein on August 2, 1943 and dated July 30, 1943, and that an appropriate citation issue returnable within forty (40) days from this date, and that the appropriate record, in accordance with the provisions of Title 28 U. S. C., Secs. 47 and 47a and in accordance with the Rules of the United States Supreme Court, be docketed in said Court within the said forty days, and it is further

Ordered that the appellant give a bond with good and sufficient surety in the sum of $250 for costs on said appeal.

Dated, New York, August 10, 1943.

Simon H. Rifkind, U. S. D. J.

W. V. O.

[fol. 245] In the District Court of the United States

[Title omitted]

Petition of Cornell Steamboat Co., for Allowance of Appeal—Aug. 10, 1943

Your petitoner, Cornell Steamboat Company, respectfully prays that, in accordance with 28 U. S. C. Sec. 47 and 47a, the appeal of Cornell Steamboat Company, plaintiff, from this Court to the United States Supreme Court from the decree and judgment entered herein on August 2, 1943 be allowed and that the bond for costs on appeal with good and sufficient surety in the sum of $250, submitted herewith, be approved.

The said plaintiff submits herewith for filing its assignment of errors together with its statement as to the juris-[fol. 246] diction of the United States Supreme Court, pursuant to Rule 12 of the Rules of said Court.

Dated, New York, August 10, 1943.

Yours, etc., Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Plaintiff, by Robert S. Erskine, a Member of the Firm. 120 Broadway, Borough of Manhattan, City of New York.

[fol. 247] IN THE DISTRICT COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENTS OF ERROR OF CORNELL STEAMBOAT CO.—Aug. 10, 1943

Cornell Steamboat Company, plaintiff in the above-entitled suit, hereby assigns error in the opinion, findings, conclusions and judgment of the Court herein as follows:

1. The Court erred in failing to find and conclude that plaintiff is not engaged in the business of transportation by water nor in the business of a carrier by water within the provisions of Part III of the Transportation Act of 1940, and in failing to enjoin, set aside, suspend and annul the certificate and order of the Interstate Commerce Commission herein on the said grounds.

2. The Court erred in failing to find that, on the undis-[fol. 248] puted facts in the record, plaintiff is an independent tower and, as such, is not a person or party within the definitions and provisions of Part III of the Transportation Act of 1940, and therefore is not subject to regulation by the Interstate Commerce Commission under the said Act.

3. The Court erred in seizing upon, lifting from the context, and adopting only a portion of an unique definition of the word "transport", contained in an unnamed dictionary, and utilizing such with resulting distortion as the test of the applicability to the Plaintiff of Part III of the Act.

4. The Court erred in failing to interpret the provisions of Part III, of the Act and the intent of Congress as set out herein, in accordance with the common and accepted meaning of the language thereof, as used by Congress in earlier legislation relating to water carriers, and as heretofore defined by the courts.

5. The Court erred in its interpretations of the language of Sections 302(c)(d); Section 303(f) (2); Section 320(d); and Section 309(a), by failing to give to the words therein the common and accepted meaning as used by Congress in earlier legislation relating to water carriers and as previously defined by the courts.

6. The Court erred in finding and concluding that plaintiff is subject to regulation under Part III of the Act of 1940 as a common carrier, when in fact and in law the plaintiff is not a common carrier, thereby seriously affecting the legal status and rights of the plaintiff and depriving the plaintiff of its liberty and property without due [fol. 249] process of law.

7. The Court erred in finding and concluding that plaintiff has held itself out to the public as a common carrier by water.

8. The Court erred in failing to find on the undisputed facts in the record that plaintiff, if subject to Part III of the Act at all should be classified only as a contract carrier.

9. The Court erred in failing to interpret the provisions of Section 302 (i)(1) with respect to interstate commerce in accordance with the plain meaning of the language thereof.

10. The Court erred in finding that in spite of the language of Section 302(i)(1) towage services rendered between points in New York State are interstate services under the provisions of Part III of the said Act.

11. The Court erred in failing to find that Congress intended the provisions of Section 302 to provide for water carriers definitions of interstate commerce wholly different from those provided for rail and motor carriers under Parts I and II of the said Act.

12. The Court erred in its Finding of Fact No. 6, because there is no evidence in the record that the navigable channel of the river for the seven or eight miles referred to is on the New Jersey side of the river, or that plaintiff's tows are obliged to navigate or do actually navigate on the New Jersey side of the river through that stretch.

[fol. 250] 13. The Court erred in dismissing plaintiff's petition.

Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for plaintiff, Office & P. O. Address, 120 Broadway, Borough of Manhattan, New York 5, N. Y.

[fols. 251-252] [Citation in usual form omitted in printing.]

[fol. 253] In the District Court of the United States

[Title omitted]

Petition of Boston Tow Boat Co., for Allowance of Appeal—August 30, 1943

Your petitioner, Boston Tow Boat Company, respectfully prays that, in accordance with 28 U. S. C. Secs. 47 and 47a, the appeal of Boston Tow Boat Company, intervening plaintiff in the above entitled action, from this Court to the United States Supreme Court from the decree in judgment entered herein on August 2, 1943 be allowed, and that the bond for costs on appeal with good and sufficient surety in the sum of $250, submitted herewith, be approved.

The said intervening plaintiff submits herewith for filing its assignment of errors and adopts by reference the statement as to the jurisdiction of the United States Supreme Court filed in this action by Cornell Steamboat Company, plaintiff petitioner for appeal.

Dated, New York, August 30, 1943.

Bingham, Dana & Gould, Albert T. Gould, Charles S. Bolster, by Charles S. Bolster, a Member of the Firm, 1 Federal Street, Boston 10, Massachusetts.

[fol. 254] In the District Court of the United States

[Title omitted]

Order Allowing Appeal of Boston Tow Boat Co.—August 30, 1943

The petition of Boston Towboat Company, intervening plaintiff, for an appeal to the United States Supreme Court from the final decree and judgment entered herein on August 2, 1943 having been presented, together with its assignment of errors, and said intervening plaintiff having adopted by reference the statement as to the jurisdiction of the United States Supreme Court heretofore filed herein by Cornell Steamboat Company in its appeal to said Court allowed on August 10, 1943, it is

Ordered that an appeal be and is hereby allowed to the Supreme Court of the United States by Boston Towboat

Company, intervening plaintiff, from the final decree and [fol. 255] judgment entered herein on August 2, 1943 and dated July 30, 1943, and that an appropriate citation issue returnable within forty (40) days from this date, and that the appropriate record, in accordance with the provisions of Title 28 U. S. C., Secs. 47 and 47a and in accordance with the Rules of the United States Supreme Court, be docketed in said Court within the said forty days, and it is further

Ordered that the appellant give a bond with good and sufficient surety in the sum of $250. for costs on said appeal.

Dated, New York, August 30, 1943.

Samuel Mandelbaum, U. S. D. J.

[fol. 256] In the District Court of the United States

[Title omitted]

Assignments of Error of Boston Tow Boat Co.—August 30, 1943

Boston Tow Boat Company, intervening plaintiff in the above entitled suit, hereby assigns error in the opinion, findings, conclusions and judgment of the Court herein as follows:

1. The Court erred in failing to find and conclude that plaintiff is not engaged in the business of transportation by water nor in the business of a carrier by water within the provisions of Part III of the Transportation Act of 1940, and in failing to enjoin, set aside, suspend and annul the certificate and order of the Interstate Commerce Commission herein on the said grounds.

2. The Court erred in failing to find that, on the undisputed facts in the record, plaintiff is an independent tower and, as such, is not a person or party within the definitions and provisions of Part III of the Transportation Act of 1940, and therefore is not subject to regulation by the Interstate Commerce Commission under the said Act.

[fol. 257] 3. The Court erred in failing to interpret the provisions of Part III, of the Act and the intent of Congress as set out therein, in accordance with the common and accepted meaning of the language thereof, as used by Congress in earlier legislation relating to water carriers, and as heretofore defined by the courts.

4. The Court erred in its interpretations of the language of Sections 302(c)(d); Section 303(f)(2); Section 320(d); and Section 309(a), by failing to give to the words therein the common and accepted meaning as used by Congress in earlier legislation relating to water carriers and as previously defined by the courts.

5. The Court erred in finding and concluding that plaintiff is subject to regulation under Part III of the Act of 1940 as a common carrier, when in fact and in law the plaintiff is not a common carrier, thereby seriously affecting the legal status and rights of the plaintiff and depriving the plaintiff of its liberty and property without due process of law.

6. The Court erred in dismissing plaintiff's petition.

Bingham, Dana & Gould, 1 Federal Street, Boston 10, Massachusetts, Attorneys for Intervening Plaintiff.

[fols. 258-259] Citation in usual form omitted in printing.

[fol. 260] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER, CONSENT AND STIPULATION RE CERTIFICATION OF ORIGINAL DOCUMENTS

On the annexed consent and stipulation, and on motion of Kirlin, Campbell, Hickox, Keating & McGrann, attorneys for Cornell Steamboat Company, plaintiff-appellant, and on motion of Bingham, Dana & Gould, attorneys for Boston Towboat Company, intervening plaintiff-appellant, it is

Ordered that the Clerk of this Court be and is hereby directed to certify the originals of the following documents instead of a transcript thereof, pursuant to the provisions of Title 28 U. S. Code, Section 47a, to be transmitted to the Supreme Court of the United States in the above entitled appeal:

1. Petition of Plaintiff.
2. Answer of United States of America.
3. Answer of Interstate Commerce Commission.

[fol. 261] 4. Intervention of Interstate Commerce Commission.

5. Notice of motion of National Water Carriers Association, Inc. to intervene, with affidavit of Chester H. Sanders annexed.

6. Petition of Boston Tow Boat Company to intervene.

7. Certified record of Interstate Commerce Commission.

8. Opinion.

9. Findings of fact and conclusions of law.

10. Final decree and judgment.

11. Petition of Cornell Steamboat Company for and order allowing its appeal.

12. Assignment of errors of Cornell Steamboat Company.

13. Statement of Cornell Steamboat Company as to jurisdiction of United States Supreme Court with appendices A to G inclusive annexed.

14. Notice of Cornell Steamboat Company directing attention to Rule 12 (3) of the United States Supreme Court with admission of service of copies of said notice, citation on its appeal, its statement as to jurisdiction, its petition for and order allowing its appeal and of its assignment of errors.

15. Citation on appeal of Cornell Steamboat Company.

16. Petition of Boston Towboat Company adopting statement of Cornell Steamboat Company as to jurisdiction and for its appeal and order allowing its appeal.

17. Assignment of errors of Boston Towboat Company.

18. Admission of service of petition for and order allowing appeal of Boston Towboat Company, citation thereon, and its assignment of errors with waiver of notice provided for in Rule 12 (3) and waiver of opposition to jurisdiction pursuant to said rule.

19. Citation on appeal of Boston Towboat Company.

And it is further

Ordered that a certified copy of this order be transmitted to the Supreme Court of the United States with the afore-[fol. 262] said documents.

Dated, New York, September 14th, 1943.

Hulbert, U. S. D. J.

Consent and Stipulation

We hereby consent to the entry of the foregoing order and stipulate that the documents set forth in the foregoing

order, together with a certified copy of said order to be transmitted therewith, shall constitute the record in the above entitled appeal.

Dated, September 1, 1943.

Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Plaintiff-Appellant. Robert L. Pierce, Special Assistant to the Attorney General of the United States, Attorney for United States of America, Defendant-Appellee. E. M. Reidy, Attorney for Interstate Commerce Commission, Intervening Defendant-Appellee. Bingham Dana & Gould, Attorneys for Boston Towboat Company, Intervening Plaintiff-Appellant. Foley & Martin, Attorneys for National Water Carriers Association, Inc., Intervening Defendant-Appellee.

[fols. 263-267] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 268] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER CONVENING JUDGES AND FIXING TIME OF HEARING—June 1, 1943

It appearing from the petition herein that this suit is brought to suspend, set aside and annul a certain order of the Interstate Commerce Commission and to perpetually enjoin the enforcement thereof, and for other specified relief, and the defendant's answer to said petition and the intervention and answer of the Interstate Commerce Commission having been served,

Now, on motion of Kirlin, Campbell, Hickox, Keating & McGrann, attorneys for the plaintiff, and pursuant to the Urgent Deficiencies Act, 38 Stat. 220, Title 28 U. S. C. Section 47, it is

Ordered that the issues in this suit and any ad interim application subject to the provisions of said Urgent Deficiencies Act shall be heard and determined by Honorable John Bright, the undersigned District Judge, together with Honorable Alfred C. Coxe, District Judge, and Honorable Jerome N. Frank, Circuit Judge, the latter two judges

having been called to the assistance of the undersigned District Judge in accordance with said Statute, and it is further

[fol. 269] Ordered that the issues in this suit be brought on for final hearing and shall be heard before the said three judges on June 22, 1943, in Room 618 of the United States Court House, Foley Square, Borough of Manhattan, City of New York, at two o'clock in the afternoon, or as soon thereafter as counsel can be heard, and it is further

Ordered that service of a copy of this order upon counsel for the defendant and upon counsel for the Interstate Commerce Commission, intervening defendant, not less than five days before said hearing shall be sufficient notice of said hearing.

Dated, New York, June 1, 1943.

John Bright, U. S. D. J.

[fol. 270] In United States District Court

[Title omitted]

Stipulation and Addition to Record—September 18, 1943

It Is Hereby Stipulated and Agreed that copies of the following papers may be certified as part of the record on the above entitled appeal in addition to the papers set forth in the order and stipulation as to the record heretofore filed herein:

1. Order convening Judges.
2. Supplemental stipulation as to record.

Dated, September 18, 1943.

Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Plaintiff-Appellant. Robert L. Pierce, Special Assistant to the Attorney General of the United States, Attorney for United States of [fols. 271-272] America, Defendant-Appellee. E. M. Reidy, Attorney for Interstate Commerce Commission, Intervening Defendant-Appellee. Bingham, Dana & Gould, Attorneys for Boston Towboat Company, Intervening Plaintiff-Appellant. Foley & Martin, Attorneys for National Water Carriers Association, Inc., Intervening Defendant-Appellee.

[fol. 273] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS AND DESIGNATION OF RECORD—Filed September 25, 1943

Cornell Steamboat Company and Boston Towboat Company, the appellants, each adopts its assignment of errors as its statement of the points to be relied upon and represents that the whole of the record as filed is necessary for the consideration of the case.

Dated, New York, September 15, 1943.

Robert S. Erskine, Counsel for Appellant, Cornell Steamboat Company, 120 Broadway, New York 5, N. Y. Charles S. Bolster, Counsel for Appellant, Boston Towboat Company, 1 Federal Street, Boston 10, Massachusetts.

To: Charles Elmore Cropley, Esq., Clerk of the Supreme Court of the United States, Washington, D. C.

[fols. 274-279] Robert L. Pierce, Esq., Special Assistant to the Attorney General of the United States, Attorney for United States of America, Defendant-Appellee, Washington, D. C.

E. M. Reidy, Esq., Attorney for Interstate Commerce Commission, Intervening Defendant-Appellee, Washington, D. C.

Foley & Martin, Esqs., Attorneys for National Water Carriers Association, Inc., Intervening Defendant-Appellee, 64 Wall Street, New York, N. Y.

[fol. 280] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—October 25, 1943

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 47,877, 47,878, Southern New York, D. C. U. S., Term No. 384. Cornell Steamboat

Company, Appellant, vs. The United States of America, Interstate Commerce Commission and National Water Carriers Association, Inc. Term No. 385. Boston Towboat Company, Appellant, vs. The United States of America, Interstate Commerce Commission and National Water Carriers Association, Inc. Filed September 25, 1943. Term No. 384 O. T. 1943. 385 O. T. 1943.

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